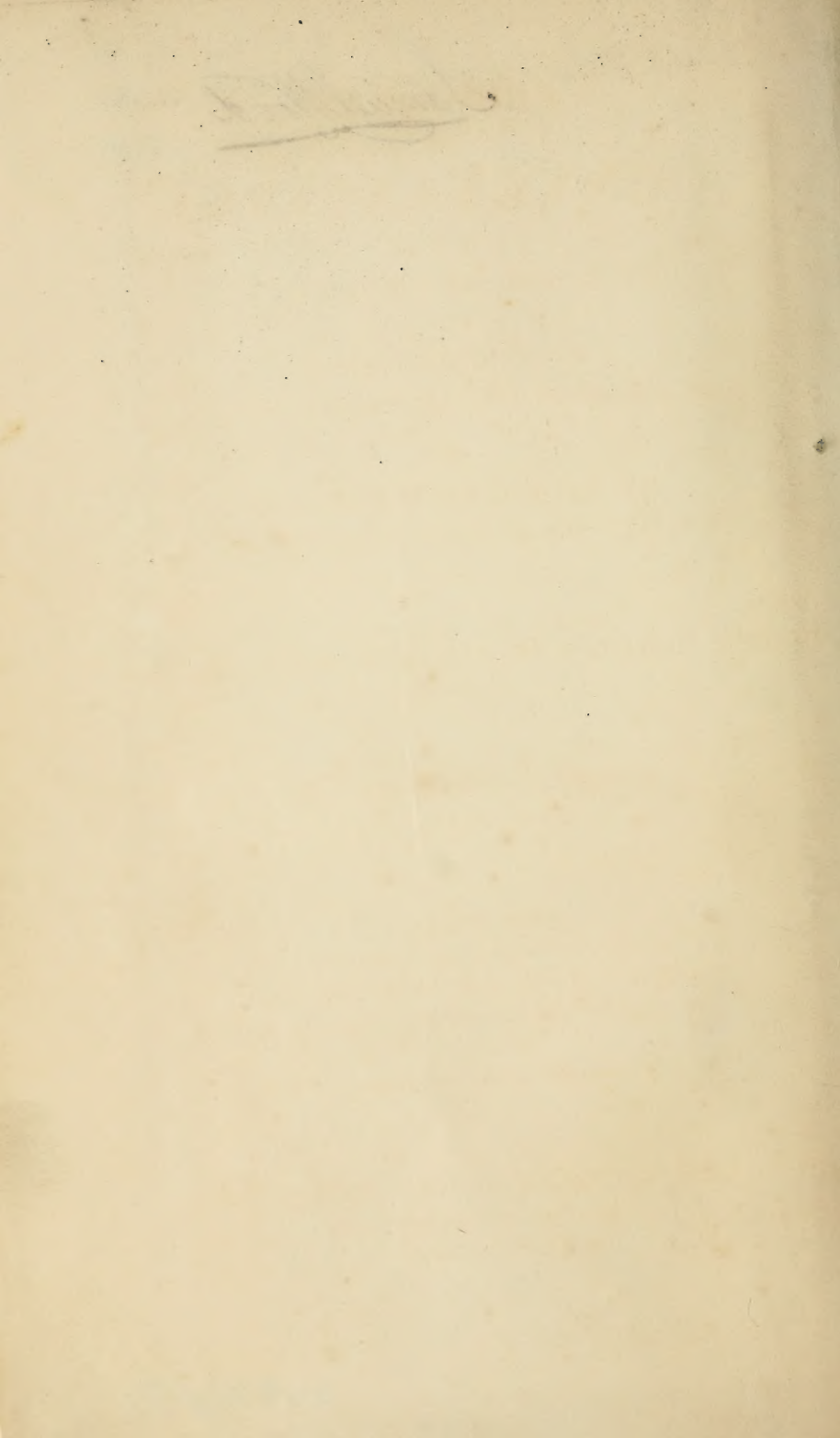


Samuel Wood

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PRINCIPLES
OF
CONVEYANCING;

DESIGNED FOR
THE USE OF STUDENTS:
WITH
AN INTRODUCTION
ON THE STUDY OF THAT BRANCH OF LAW.

BY CHARLES WATKINS,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

PART I WITH ANNOTATIONS BY
GEORGE MORLEY & RICHARD HOLMES COOTE, ESQRS.
BARRISTERS AT LAW.

PART II. WITH ANNOTATIONS BY
THOMAS COVENTRY, ESQ.
BARRISTER AT LAW.

Fifth Edition,
REVISED AND CONSIDERABLY ENLARGED BY
HENRY HOPLEY WHITE, ESQ.,
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

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THE
EDITOR'S PREFACE
TO THE
NINTH EDITION.

NUMEROUS alterations and additions* have been made in the text and notes of the present Edition, to keep pace with the important changes, both in principle and practice, which judicial opinion and legislative enactments have effected, in the law of real property, since that of 1838. More than two hundred references have been added and some Chapters nearly remodeled.

The observations occurring throughout the Work upon the provisions of the recent Statute of the 7th and 8th Vict. c. 76, are offered with the

* These are carefully noticed by brackets in this as in the preceding Edition.

diffidence and distrust, which the Editor cannot but feel, in expressing any opinion upon its construction; and he has abstained from noticing many of the doubts which it has occasioned, in the expectation that those doubts may soon be removed by the Legislature.

The demand for the last Edition would seem to justify the anticipation expressed on its publication; and the present is dismissed with the hope that the additional labour bestowed upon it may further extend the usefulness of the work, not only as a valuable compendium of the law of real property for the Student, but as a book of ready and convenient reference for the Practitioner.

*Lincoln's Inn,
February, 1845.*

THE
EDITOR'S PREFACE
TO THE
EIGHTH EDITION.

THE numerous and important changes effected in the law of real property since the last Edition in the year 1831, have led to an entire revision of this deservedly popular and useful Treatise. The task of introducing into the valuable annotations of former Editors, the corrections which later decisions and legislative enactment rendered indispensable, was felt to be not less delicate than difficult. The kindness of *Messrs.*

Morley and Coote, in reviewing the corrections suggested in their notes,* has lessened the responsibility, while it has much enhanced the value of the labours of the present Editor, whose best acknowledgments are due, for the alacrity with which that service was rendered to himself, and to the Profession.

The great length and varied character of the annotations † of *Mr. Coventry*, entirely precluded the request of a similar favour from him ; although his sanction to the alterations and additions made in his portion of the work, would have been very desirable. The Editor has retained the notes, which he published anonymously in his former Edition in 1831, and has inserted many others, with three additional chapters, on the Law of Inheritance, on the Statutes of Distribution, and on the Law

* Those of *Mr. Morley* terminate at page 60, those of *Mr. Coote* at page 126.

† Commencing at page 137, and terminating at 450, and the statutes from page 469 to 505.

of Executors and Administrators, as it more immediately relates to the chattels real of a deceased trustee.

The Editor is also responsible for the principal part of the chapter on *féme coverte*; in which are discussed the leading distinctions, that have lately engaged the attention of the Courts of Equity, on the subjects of restraint on alienation and separate use. On account of the recent changes in the law, many alterations, in the text of *Mr. Watkins*, have become unavoidable; particularly in the chapters on Dower, Devise, Fines, and Recoveries: but those alterations, as well as all others in this edition, are carefully distinguished by brackets. Notices of the statutes relating to the law of real property, including those of the last session, have been introduced. Much attention has been devoted to the correction of the former references; and about two hundred additional authorities have been cited. The Editor dismisses the volume in the hope that he has increased the use-

fulness of a work, which, by the combined labours of the learned author and his annotators, has so long retained its reputation in the Profession, as a valuable compendium of the law of real property.

Lincoln's Inn,
February, 1838.

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ERRATA.



- Page 112, margin, for *Howard*, read *Haward*.
213, note, line 10, for 1 & 2 *Vict. c. 26*, read 1 & 2 *Vict. c. 26, s. 29*.
281, margin, for *Hale*, read *Hole v. Escott*.
368, line 22, for *Ongley*, read *Ougly*.
423, note, line 1, for *Harrey*, read *Harvey v. Ashley*.
471, line 4, for 5, read 6 *Edw*.
518, line 25, for *s. 2*, read *s. 3*.

INTRODUCTION

BY

MR. WATKINS.

All the Notes to this Introduction are by MR. WATKINS.

AMONG the many discouragements which attend the study of the law, there is none more obvious, or more generally complained of, than the want of method and direction.

To take a young person from an university or a school, where his mind has been occupied with other pursuits, and to toss him headlong into the practice of the law, wholly unprepared, or with little preparation, for so arduous a study, is in itself so absurd, that we can only wonder at its occurrence.

What must be the embarrassment of such a person amid business of such nicety as to call forth the full exertion of the veteran in practice?—It is folly to expect from the human mind, what a moment's reflection would tell us it would be impossible for the human mind to perform. Conveyancing is not intuitive any more than the mathematics. The mind cannot draw conclusions without having been previously furnished with premises. And however the individual may be prepossessed in favour of a peculiar mode of study, they are, and, while the human mind continues what it is, there must be, general rules which ought to be attended to in the acquiring of knowledge.

We must be sensible that we can act with greater energy in proportion as our attention is confined. That attention becomes weakened as it becomes divided. We must analyze in order to comprehend with accuracy. We must understand the cause before we can embrace its consequences. It should seem to follow, therefore, that in law, as in other sciences, we should begin with the first principles, and form

a general outline before we descend to the *minutiæ*.

A general outline the mind can easily embrace, and the general principles of law it can easily remember. When acquainted with a whole, we may discern the symmetry of the parts: but an insulated position will appear arbitrary, and its connection will not be seen. As difficulties arise, or new matter presents itself, a general principle will afford us a rallying point; and we shall find ourselves possessed of premises from which we may argue.

To a general outline, and to general principles, then, should the student be at first confined. To rush into miscellaneous and unconnected reading is to embarrass and distract the intellect; is to weary the powers of the mind with unnecessary, and with useless exertion. It is to contradict the suggestions of common sense and experience, and to violate the rules which nature herself has imposed.

But, in direct defiance of principles so obvi-

ously, how often do we see *Coke upon Littleton*, or a volume of Reports, put into the hands of a young person on his entering upon the Profession! From the miscellaneous nature of such writings, an idea is often effaced as soon as it is formed. The mind is hurried from subject to subject, without being suffered to dwell sufficiently upon any. Points of the greatest nicety, and learning the most abstruse, are suddenly presented to the view of a novice, which would perhaps puzzle the most experienced lawyer. Deductions and conclusions are given when the principles from whence they flowed remain unexplained, and even unknown, to the student. The observations on *Littleton* by Lord *Coke* are wholly without method. Such a chaos of incoherent observation is by no means calculated for a regular perusal. Our attention is frequently called from an anxious consideration of a legal principle to a dissertation on the, &c. of *Littleton*, to an account of Sir William Hearle, or to a quotation from Virgil or Horace. Indeed, the want of method in most of this writer's works makes them more proper for occasional consultation, than the perusal of the student. His strange quaintness

and eccentricities may make one smile ; but they divert the attention, and withdraw it from the subject to which we wish it confined.

That the *Commentary upon Littleton* contains a valuable fund of Common Law learning is certain : but the observations are thrown together without order. Great as Lord *Coke* may be, the prejudice in his favour may, perhaps, be extravagant. His industry was astonishing : but he seems to have possessed little of the spirit of law : and whatever might have been his legal learning, the frequent illiberality of his sentiments cannot be sufficiently reprobated ;* and the student ought to be cautioned against it.

* The manner in which he treated Sir Walter Raleigh may be seen in the State Trials ; and will be an object of execration while his name shall continue.

In *Calvin's* case (7 *Rep.* 17, a.) he says, “ All infidels (among whom he reckoned the *Jews*, 2 *Inst.* 507), are in law *perpetui inimici*, perpetual enemies, for the law presumes not that they will be converted, that being *remota potentia* (a remote possibility) ; for between them, as with the devils whose subjects they be, and the Christian, there

A Volume of Reports must, from its very nature, be full of unconnected matter ; and, consequently be improper for early reading. The report of particular cases may, indeed, be read by the student with advantage : but they should be cautiously pointed out for his perusal, and carefully explained.

The number of reporters, and the manner in which many cases are reported, are most serious evils ; are evils which cannot be too much lamented, nor sufficiently exposed. The

IS PERPETUAL HOSTILITY AND CAN BE NO PEACE.” The illiberality of Lord *Coke* with respect to the Jews has been deservedly condemned and held up to detestation in the case of *Omychund v. Barker*, which is reported in a very superior manner by *Athyne* (Vol. i., p. 11), and which cannot be too strongly recommended to the Reader’s perusal. The argument of the Solicitor-General, Mr. *Murray* (afterwards Lord *Mansfield*), is a masterpiece of its kind ; and those of the Lord Chancellor (*Hardwicke*) and the three Chiefs who assisted him (*Lee* and *Willes*, C. J. J., and *Parker*, C. B.), were worthy of Christians, as the sentiments of Lord *Coke* were disgraceful to him as a man, and much more so as a professor of the Gospel.

contradictory statements of the same case, the confounding the arguments, nay assertions of the counsel, with the decisions of the Court, the *obiter*, and extra-judicial sayings of the Judges, with the grounds of the judgment, the observations of the reporter with the points of the case, call aloud for the nicest and severest discrimination.

I believe it will be found on examination, that an implicit submission to the assertions of our predecessors, whatever stations those predecessors might have filled, has been one of the most certain sources of error. Perhaps there is nothing which has so shackled the human intellect, nothing which has so retarded the progress of truth, nothing which has so greatly promoted whatever is tyrannic, preposterous, or absurd, nothing which has so much degraded the species in the scale of being, as the implicit submission to individual *dicta*. The blunders of one age (and blunders have occurred in all ages) cannot warrant the blunders of another. What was once expedient may now, by reason of a change of circumstances, be improper. To

appeal to matters of fact, with respect to matters of right, is, in itself, preposterous and absurd. If we must be bound by former decisions, let those decisions be given by the most unequivocal authority. Let the statement of facts, the decision of the Court, and the grounds and reasons of that decision, be drawn up by a proper officer, and signed by the Judges who preside. Let not the crude notes of the dead be brought forward to mislead the living. Let not the reputation of those who have left us, and who are no longer able to defend themselves, become the prey of the sweepers of their closets. We should consider that many who took notes in Court did not take them with a view to publication : but that those notes were frequently ushered into public merely from the rapacity or avarice of those who survived. Compare *Rolle's Reports* with his *Abridgment*. Look at the undetermined cases in *Dyer*. Consider how soon a quoted case becomes what is called authority, and consider how soon authority shoulders out common sense. It would not be difficult to point out many instances in which the adherence to the reports of adjudged cases has overthrown the acknowledged principles

of the law of the land, and, in effect, repealed the solemn acts of the legislative body.* If the acts of the legislative body become incompatible with the manners of the times, let us apply to the legislative body for their alteration or repeal, but let not the Judges become superior to the legislative body.

“*Ita lex scripta est*, is the cry of many a man who would be angry with another that expressed a doubt whether he possessed ratio-

* The famous *Habeas Corpus* case, in 1627, was determined on the authority of precedents, directly in the teeth of *Magna Charta*, and six other statutes. “Precedents were read,” says *Selden*; “Acts of Parliament were passed over.” (*Seld. Works*, Vol. VI. p. 1956-58.) The substance of Sir Nicholas Hyde’s curious apology for this violation of the laws of his country, may be seen in 1 *Rushw. Coll.* 461.

In the celebrated *Bewdley* case, (which has been frequently recognised *as law*!) the practice of the Court for seven years was held superior to an Act of Parliament! 1 *P. Wms.* 223. 2 *Str.* 755. 3 *Burr.* 1755.

See, as to the Statute of Uses, 1 *Atk.* 591, in *Hopkins v. Hopkins*, 2 *Bla. Comm.* 335-36. *Dougl.* 774, &c.

cination. About the time of passing the Statute of Uses, some wise man, in the plenitude of legal learning, declared that there could not be an use upon an use. This very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted, and is still adopted; and upon it (at least chiefly) has been built the present system of uses and trusts. Another, adopting just so much of an argument as answered his purpose, and rejecting a conclusion which followed from the self-same premises, decreed that there should be no dower of a trust; and Chancellor after Chancellor submitted to this strange assertion, and followed it in defiance of every thing rational. "We are bound by precedent," say they; but are we not bound by principle also? Can precedent release us from a moral obligation?

If reports of adjudged cases be frequently found such as I have noticed, it surely will be sufficient to advert to them, in order to guard the student from relying upon them where the reason of the decision is not apparent.

WHEN WE ARGUE FROM ADJUDGED CASES, WE ARGUE FROM CONCLUSIONS ALREADY DRAWN, AND NOT FROM PREMISES BY WHICH THOSE CONCLUSIONS MUST BE WARRANTED. THE MORE WE ARE REMOVED FROM THOSE PREMISES, THE GREATER THE PROBABILITY OF ERROR IN OUR CONCLUSIONS MUST NECESSARILY BE.

But supposing that a person should be so fortunate as to be able to extract something comprehensible out of *printed* contradiction, yet other contradictions may make their appearance in *manuscript*; and, overthrowing all his hard earned knowledge, remind him once again of the *glorious uncertainty of the law*. Is the law of England to depend upon the private note of an individual, and to which an individual can only have access? Is a Judge to say,—“Lo! I have the law of England on this point in my pocket. Here is a note of the case which contains an exact statement of the whole facts, and the decision of my Lord *A.*, or my Lord *B.*, upon them. He was a great, a very great man. I am bound by his decision. All you have been

reading was erroneous. The printed books are inaccurate. I cannot go into principle. The point is settled by this case."—Under such circumstances, who is to know when he is right, or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England? And who, that retains any portion of rationality, would waste his time and his talents in so fruitless an attempt? Is a paper evidencing the law of England to be buttoned up in the side-pocket of a Judge, or to serve for a mouse to sit upon in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of those adjudged cases be certain, known, and authenticated. What an idea must a foreigner form of our laws, when he conceives them either founded upon, or subject to be contradicted by, nobody knows what?

I acknowledge the utility of publishing the solemn decisions of the Courts; but I say again, let the reports of those decisions be faithfully

given and stamped with authority ; and let the grounds of such decisions be rational and apparent.* Let not the laws of England be picked out, like diamonds from a dunghill, from among such crude and incoherent, such unintelligible and contradictory matter,† as now loads our

* It is but little consolation to say, on the trial of a cause, "That case is not law," after it has misled half the kingdom.

† "It seems to me," said Lord Commissioner *Eyre*, "that those two cases [*Acherley v. Vernon*, and the *Attorney-General v. Dowing*,] are in direct opposition to each other:—but it seems [also] to me, upon the best consideration, that the former case is so determined, and is of such authority, that every thing must yield to it," 1 *Ves. Jun.* 495. *Barnes v. Crowe*.

It would require some ingenuity to reconcile the cases of *Burnaby v. Griffin*, (3 *Ves. Jun.* 266,) and *Mores v. Huish*, (5 *ibid*, 692,) though determined by the *same* Chancellor. In the former it was ruled that a feme covert, who was entitled to rents and profits during her life *for her separate use*, might make an equitable tenant to the *præcipe*; but in the latter it was held, that though the feme covert was so entitled, and even though the rents and profits were expressly given to the intent and purpose that they might

shelves. Let us seriously consider the evils which must arise from suffering absurdity* to

“be solely *at her own disposal*,” she could not charge them. Which of these cases then is law? If the latter, the recovery which was supported in the former must be good for nothing; and if the former be law, the latter cannot well be so. The feme covert *must have had* power to transfer or charge her interest, or *not* had power to do so.—To say that she *had* such power, and that she had *not*, would be a contradiction in terms; and it should seem, therefore, that these cases are also contradictory.

* “The absurdity of Lord Lincoln’s case is shocking.” “However, it is now law,” said *Lord Mansfield*, in the case of *Doe v. Pott, Dougl.* 722.

A power was given to a person to appoint by writing under *seal*; and she made a will or codicil on *stamped* paper; and according to the report of the case of *Sprange v. Barnard*, (2 *Brown’s C. C.* 585,) it was held, at the Rolls, to have been a good execution of the power:—“*The stamp being equivalent to a seal.*” But, surely, if the stamp can be considered as a seal, it must be that of the Commissioners for managing the stamp duties, or at least of Government, and not of the person writing on the paper stamped. If I sign a receipt for fifty shillings upon a stamped paper, will the receipt be *an instrument under seal*?

be consecrated by use ; and when established as a precedent, to interfere with, and, perhaps, to render nugatory, the undoubted principles of our laws.

If the laws of England are to depend upon the decision of a Judge, we should remember that the decision of a Judge may overthrow them.

However well acquainted a person may be with adjudged cases, he will soon find cases occur in practice with which those already decided will not altogether accord. In such circumstances he can only have recourse to principle. The necessity of an acquaintance with principle, therefore, is too apparent to be further insisted on.

Another class of writings which the student should avoid, or, at least, read with extreme caution, is that of detached arguments on cases which have been adjudged. Arguments thus published, when presented under the sanction of general reputation, and crowded with a profusion of legal reference, are too often calculated to

mislead. The student must not be satisfied with assertion, or carried away by the name of an author. If he cannot confront argument with argument, and receive the necessary *data* on *both* sides of the question, he should suspend his judgment; he must not decide upon *ex parte* evidence. Besides, such arguments are, for the most part, on points of much nicety, and which seldom arise; and he should defer the consideration of such till he has made himself master of principles more general, and of propositions more obvious and evident.

When success has attended a peculiar mode of study, it may be reasonable to suppose it to be just, and warrantable to recommend it to others. I would, therefore, advise the student to begin with a general outline: he may fill it up at his leisure, as he may find himself prepared for the undertaking: to confine himself at first strictly to principles; and, when he meets with technical terms, to be content with a mere explanation, and not pursue the subject of that term any further, as it will only withdraw his attention from that which he meant to

pursue. It is the great fault of our Law Dictionaries, generally, that they partake too much of the nature of Abridgments. But a dictionary and an abridgment are very different things, and ought to be kept apart. It is much to be wished that a Law Dictionary might be given which would comprehend merely the terms of art, and those obsolete words which occur in old legal or historical writers.

His general books may be *Finch's Law*; *Blackstone's Commentaries*; *Wynne's Eunomus*; *Hale's Common Law*; *Reeve's History*; *Sullivan's Lectures*; *Dalrymple on Feudal Property*; *Littleton* (without the Commentary); the Freehold part of *Gilbert's Tenures*; Select Notes to the late Editions of *Co. Litt.*; *Touchstone*; and *Fonblanque on Equity*, with *Francis's Maxims*.

Having gained a general view of the Law, and being taught to divide his subject, he may pursue it as far as his inclination may lead him. He may go up to *Puffendorf* or *Grotius*, or down to a volume of reports, or the fleeting publications of the day.

I recommend the Commentaries of *Blackstone* as a general book. The intention of that ingenious writer was to give a comprehensive outline; and when we consider the multiplicity of doctrine which he embraced, the civil, the criminal, the theoretical and practical branches of the Law, we must confess the hand of a master. But in the *minutiæ* he is frequently, very frequently, inaccurate. He should, therefore, be read with caution. The student in reading him will often require explanation from him whose duty it is to instruct.

Noy's Maxims, in all the editions, are too incorrect to be entrusted in the student's hands. *Perkins* has too many *queries*; though *Perkins* may be gone through with advantage, if accompanied with oral explanation.

The following pages have been also found to yield assistance to the student; and they are presented to the world in the hope that they may be more extensively serviceable than they could have been if confined to manuscript. The mode of reading them was this;—The student,

after being acquainted with some general books, as before recommended, read the work entirely through, that he might form a view of the whole. He then began again, and read chapter by chapter; consulting the books, or portions of books, referred to, *but confining himself strictly to the subject of the chapter immediately before him*; and the whole was accompanied with oral explanation, whenever he felt himself at a loss. He paused between the chapters when the connection was not immediate, that there might be no concussion of ideas, or that an idea formed on one subject might as little as possible be effaced by an idea on another.

The study of the laws of a country, and especially the laws which have been accumulating for many, many centuries, must necessarily be attended with labour. But we should not intimidate the student at the threshold with unnecessary embarrassment. Much labour may be prevented by method, and much disgust by a favourable impression.

To prove that the profession of the law is an honourable profession, we must show it to

be enlarged in its principles, and liberal in its practice. To have gentlemen and men of genius in the profession, we must show the profession to be such as a gentleman and a man of genius may pursue.

Law should be considered as a moral science, as the rule of rational and accountable beings. The profession of the law was instituted merely for the furtherance of justice and the preservation of right;—shall we pervert it, then, to the suppression of what it was ordained to support? Shall we represent it as incompatible with any thing that is liberal, or manly, or useful? If the profession can only be pursued by abandoning the rigid dictates of moral rectitude, the nicer feelings of humanity, or the exertion of the nobler powers of the mind, it is a profession which it would be criminal in man to pursue. The conduct of some of its professors has, indeed, subjected it to much contempt; and from those who must regard it with contempt, it is folly to expect admiration: and the conduct of many who profess themselves its friends, tends but little to remove the odium it has shared.

It is ridiculous to hear a person, who boasts that his profession is *an honorary* profession, talking incessantly of his fees. It is ridiculous to hear a person, who, in a Court of justice, wilfully embarrasses a witness for the sake of gaining his cause, right or wrong, call his profession an *honourable one*. It is ridiculous to hear a person talking of *the honour* of his profession, who receives a sum of money for discovering a loop-hole in a title merely to enable his employer to creep through, that he might rescind a contract which he had entered into with his eyes open, and which every principle of moral rectitude will oblige him to perform.

We may talk as much as we please about the honour of a profession of which a conduct like this forms a part; but, while a conduct like this forms a part of a profession, no man of common honesty or of common sense can cease to regard it with contempt.

But by showing that a conduct like this is only the perversion of individuals,—that the profession, so far from requiring it, is disgraced

by a conduct like this,—that it affords a field for the exertion of the most transcendant abilities, and the most benevolent inclinations,—that it is compatible with whatever elevates or adorns the character of man,—can we only hope that the profession will own the Good and the Great.—It is by such means only that it can retain its wonted place in the scale of science, and be rendered worthy of the human mind.

If the day be not yet come, the day is very fast approaching, when knowledge shall be justly appreciated; when systematic pedantry shall no more acquire the reputation of learning; when those literary pursuits, which encumber the memory without calling forth the exertion of intellect, or amending the heart, shall be deservedly reprobated; when prejudice shall melt away before the genial beams of investigation and truth; and when learning shall only be esteemed as it becomes subservient to the *virtue*, and, OF CONSEQUENCE, to the *happiness* of mankind.

A Table of Descents.

PATERNAL LINE

MATERNAL LINE

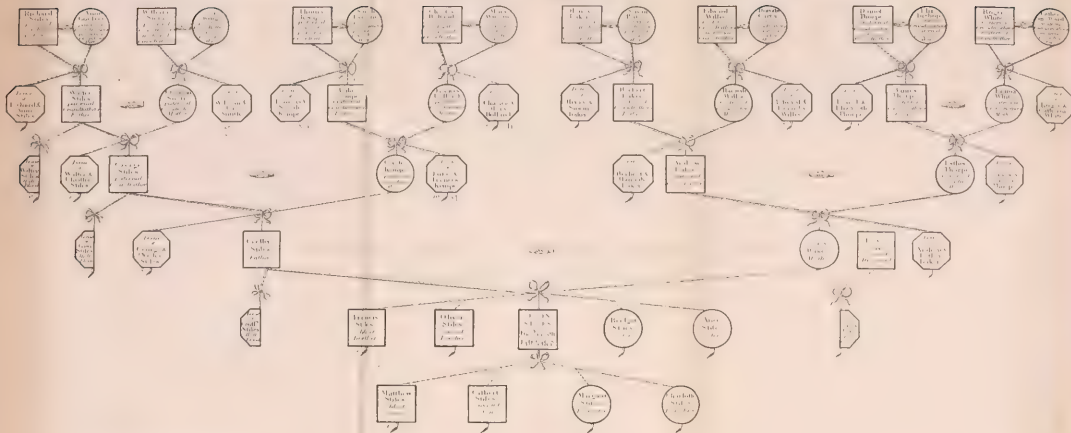
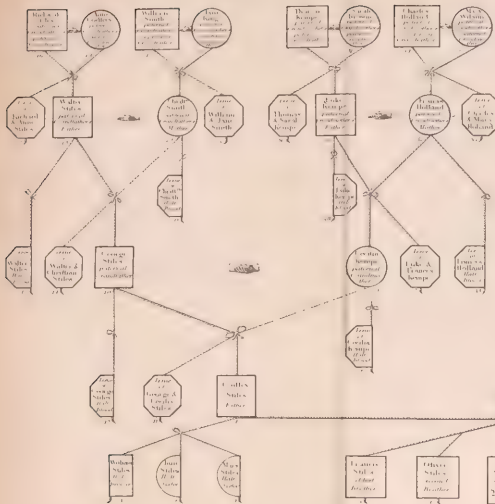
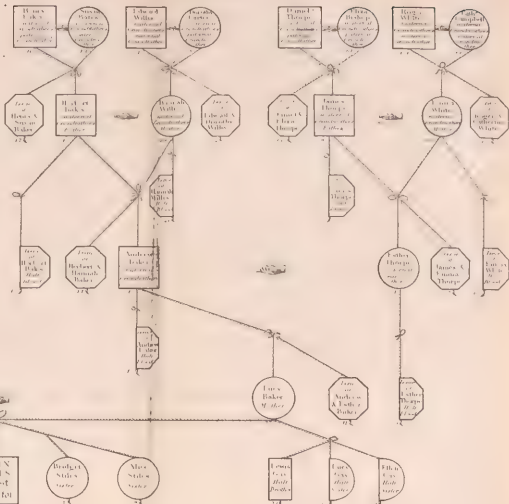


Table of Descents

INTERNAL LINE



MATERNAL LINE



Let \mathcal{C} be a class of \mathcal{L} -structures. Then \mathcal{C} is a \mathcal{L} -theory iff \mathcal{C} is closed under isomorphism and substructures.

PRINCIPLES

OF

CONVEYANCING,

&c. &c.

BOOK I.

OF ESTATES AND INTERESTS, AS THEY RELATE
TO CONVEYANCES.

CHAP. I.

OF AN ESTATE AT WILL.

AN Estate at Will [is the lowest estate which can arise by the agreement of the parties ; it] is not bounded by definite limits with respect to time ; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. As it depends upon the will of both, [which it does by implication of law, even where it is expressed to be at the will of one only, *Co. Litt.* 55. a.] the dissent of either may

2 *Black. Com.*
ch. 9, p. (145)
—(149.)
Litt. b. 1, ch. 8,
and the Com-
ment.
4 *Comyns's Dig.*
58. *Tit. Est. H.*
10 *Vin. Ab.* 396.
—420.
1 *Rolle's Abridg.*
858.
1 *Cruise's Dig.*
4th ed. 243.
9 *Bing.* 356.

[9 *Mee. & Wel.*
643.]

1 *T. R.* 382,
ad calc.

determine it.* Such an estate or interest cannot, consequently, be the subject of conveyance, [and it must determine by the death of the lessee, without conferring any title on his personal representative to hold the land.] Could the *lessee* (for he is not a *termor*, as a *termor* is co-relative with a *term* or *definite* event,) convey the premises to another, he would determine *his own will* to hold. He himself would be no longer a tenant; for he cannot be a tenant and not a tenant at the same time: and by the transfer he would part with his *own interest*. As the tenancy *is at will*, it must, [as before mentioned,] of consequence, be at the will of the lessor as well as of the lessee. Now, if the transferee [or the representative of the lessee] could become a tenant, it would be independently of the will of the lessor, and consequently he would not be a tenant at *his will*, and consequently the estate would not be a tenancy at will at all, as the will must, in such cases, be *reciprocal*. Should the lessee introduce a stranger into the tenancy *with* the assent of the lessor, it would not be a transfer of the *lessee's* interest or estate, for *his* interest or estate would be, by the very act, *determined*; but a *new* estate at will would be created, since the original lessee would relinquish

* And any conveyance by the lessor of the property held at will, is evidence of his dissent, and operates as a determination of the will. *Disdale v. Iles*, 2 *Lev.* 88. *Daniels v. Davison*, 16 *Ves.* 252.

or abdicate *his* interest or estate, and the stranger would take an estate, by the immediate act of the lessor, which had never been in the original lessee.

But as it is reasonable that a person should reap what he has sown, and as the greatest part, if not the whole, of the year, is requisite for the purposes of agriculture in its present state, the law does not favour [the raising by construction alone of] an estate at will; and, if the rent be reserved yearly or half-yearly, it frequently takes the circumstance as evidence of a *term*; *i. e.* of a lease for a year, or from year to year.* Yet, as such a presumption is merely

Bull. Nisi Pri.
84.
2 *Sir W. Black.*
Rep. 1173.
2 *Bl. Com.* 147.
Watk. N. IV.
to Gilb. Ten.
359.

* With regard to the purposes of agriculture, the tenancy from year to year does not, in all cases, appear so favourable to the tenant as an estate at will. The doctrine of emblements attached by the Common Law to the latter estate, and to all other particular estates of uncertain duration, *Co. Litt.* 55. b., protects, in a great measure, the interests of a lessee at will, so far as relates to the purposes of husbandry; and the determination of the estate, either by the act of God, or of the lessor, does not deprive the lessee, or his personal representatives, of the benefit of the growing crop; for the lessee is entitled to the crop where he sows the land, and his estate is afterwards determined by the lessor, *Litt. s.* 68. And his personal representatives are entitled to it, where the estate is determined by the death of the lessee, *Co. Litt.* 55. b. And from the same principle, it should seem that the lessee would be entitled to the crop where the estate is determined by the death of the lessor. On the other hand, if the lessee forfeits, or himself

for the furtherance of justice, if such construction would, on the contrary, be productive of wrong, such construction cannot take place; according to the maxim that a construction of law, as such, shall do injury to none. As for instance, if a lease from year to year would work a *forfeiture*,* there can be no reason for construing such a demise a lease for a year rather than an

Bulwer v. Bulwer, 2 Barn. & Ald. 470.

determines his estate, he is not entitled to emblements, *Co. Litt. ib.*, as in the first case, his loss arises from his own wrong, and in the latter, it is his folly to determine his estate before the crop is removed. Now a tenant from year to year has not the same advantage if his tenancy expires before the harvest, as he must quit at the expiration of the regular notice without any reference to the state of the crop. With respect to the rent, as effected by the determination of an estate at will, the principle is, that the act of the lessee shall not prejudice the right of the lessor; the lessee, therefore, cannot determine his estate at any time before the rent is payable, without paying rent up to the next day it would become due; but if the lessor determine the estate before the rent is due, he shall lose the rent. *Leighton v. Theed*, 2 Salk. 413, and *Title v. Grevett*, 2 Ld. Raymond, 1008. And probably the lessor, or his representatives, would be held entitled to rent, in all cases where the lessee, or his personal representatives actually receive the emblements, except in the case where the right to receive them arose from the determination of the estate by the act of the lessor.

* It is clear from the modern case of *Fenny v. Child*, 2 Mau. & Sel. 255, that the Courts of law will not raise a constructive tenancy where it shall work a forfeiture; and, therefore, a lease from year to year would not be raised by implication alone, where it would have that operation.

estate at will. And much less can we be warranted in construing that to be a lease *from year to year* which a positive Act of Parliament has declared to be an estate at *will*.

But, though it is enacted by the Statute of Frauds, (29 Cha. II. c. 3, s. 1.) that a lease *by parol*, for a longer term than three years, shall have the force and effect of an estate at will only, it is proper to inform the student that there are cases in which a lease *by parol* for a longer term than three years has been deemed to create a tenancy *from year to year*, (5 *T. R.* 471. *Doe d. Rigge v. Bell.* 8 *Ibid.* 3. *Clayton v. Blakey*,) and, consequently, as not having “the force and effect of an estate *at will only*.”

In *Clayton v. Blakey*,* Lord Kenyon is made to say :—“The meaning of the statute was, that “such an agreement should *not* operate as a *term*. “But what was then considered as a tenancy at “will has since been properly construed to enure “as a *tenancy from year to year*.” Now, what is a tenancy *from year to year* but a *term*? In *Doe d. Rigge v. Bell*, his Lordship expressly

See the next chapter.

* The reporters of this case seem to have entered completely into the spirit of it; for it is said, in the margin of the report, “*Though by the Statute of Frauds it is enacted, that all leases by parol, for more than three years, shall have the effect of estates at will only, such a lease enures as a tenancy from year to year.*”—Note by Mr. Watkins.

held that the landlord could not determine the tenancy *till the end of the year*. But, if the tenancy was not determinable *till a definite period*, it is humbly apprehended that *a term did exist*, contrary to the statute in that case made and provided, whatever may be decided to the contrary of that statute in any wise notwithstanding. For it would be confounding of ideas, it would be an abuse of language, it would be an insult to common sense, to affirm that an estate *of a definite duration* was *not a term*; or that an estate *at will* was *independent on volition*; and the statute expressly declares that the estate in question *shall* be an estate *at will*.

Now, as the statute expressly declares that such a demise shall “have the force and effect of a lease or estate *at will* ONLY, and shall not, either in law or equity, *be deemed or taken to have* ANY OTHER, or GREATER *force or effect*, any consideration for making such parol lease or estate, or any former” (the statute could not, from the very nature of the thing, provide against any future) “law or usage to the contrary notwithstanding;” to assert, in an unqualified manner, that that estate which the statute positively declared shall *be an estate AT WILL ONLY, and shall* NOT, EITHER IN LAW OR EQUITY, BE DEEMED OR TAKEN TO HAVE ANY OTHER OR GREATER EFFECT, shall NOT be an estate *at will only*, but SHALL *be deemed and taken to have* ANOTHER and

GREATER EFFECT, is certainly, very bold, if not, as certainly, very wrong.

The truth, therefore, seems to be that [before [Section 4.] the stat. 7 & 8 Vict. c. 76,] where a person leased lands to another by PAROL, *without expressing the time* for which the lessee was to hold, the law availed itself of the circumstances which the demise presented in order to construe such a lease, as creating a tenancy for a year, or from year to year, rather than a tenancy at will : but where a person leased lands to another by parol *for a longer space of time than three years* from the making of such lease, the statute interfered by declaring it an estate *at will*.

The Courts may, certainly, give a reasonable construction to the agreement of individuals ; but the Courts have not, nor can they have, without making the executive superior to the legislative power, any authority to repeal or contradict a positive Act of Parliament. If an Act of Parliament be absurd or impolitic, or inconsistent with the manners of the times, let it be repealed or altered by the powers by which it was enacted ; but, till it be so repealed or altered, it should be obeyed, if not contrary to the laws of God.*

* These observations of *Mr. Watkins* on the limits within which the Courts of law should confine their decisions, proceed from that jealousy which every person, who wishes to

Litt. sect. 460.
Co. Litt. 270.b.

But a lessee at will, though he cannot transfer his own interest, is capable of accepting a re-

preserve the constitution of this country, must feel when he sees any branch of it assuming powers that encroach on the functions allotted to another. For it is useless to confine the powers of making laws to a legislative body, if the Courts who are to carry them into execution assume a jurisdiction which renders those laws nugatory. But, at the same time, we must not forget, that a great part of the law of England has arisen from the decisions of our Courts; and to the principles which have influenced the Courts in their decisions, and which have afterwards derived authority from those decisions, we have been indebted for many valuable improvements. The condition of villeinage was, in fact, abolished by the steady opposition of the Courts of law, and their taking advantage of every circumstance which ingenuity could suggest to favour the manumission of the persons subject to that degrading servitude. From the same source probably the tenure of copyhold arose in the place of one depending on the mere will of the lord. The free circulation of landed property, by admitting a power of barring entails, was derived from the same quarter. In these instances, not to mention others, the Courts by a series of decisions, founded on an enlightened policy, gradually encroached on the established order of things, and ultimately effected a great and beneficial alteration in the state of society and property; and these changes probably would not have been made so early had they been attempted by an application to the Legislature. The burthens of the feudal system were also virtually got rid of before they were removed by the legislative authority; for, by the invention of uses, and afterwards by the introduction of trusts, the rigour of that system was so far alleviated that it existed scarcely otherwise than in name when it was eventually abolished. The history of our jurisprudence shows, there-

lease of the inheritance from his lessor, on such lessee's entry into the premises: for he has a

fore, that our Courts have always exercised a power which cannot be strictly reconciled with their authority, considering them as merely intrusted with the execution of the laws; and in the exercise of this power, experience has shown, in most cases, that the Courts have felt the influence of the progress of liberal principles earlier than the Legislature, particularly where the application of those principles concerned only the mutual rights of individuals. In the present state of society, the exertion of this power ought certainly to be narrowly watched, and perhaps ought never to be admitted in any question of constitutional law. For, with whatever safeguards the judicial authority may be environed, to prevent the influence of government from swaying its determinations (and it is difficult in this view to form any system more perfect than that established in this country), yet there appears to be generally a bias in the judicial towards the governing power; and probably, on examination, many of the changes which have been effected by the exertions of the Courts of judicature may be traced to such a bias; particularly in the destruction of villeinage, and the unfettering of entails, they were perhaps influenced more by a desire of weakening the power of the nobles, and rendering the authority of the Crown predominant, than by any other motive. It may therefore be a question, whether, notwithstanding the benefits that have been derived from a contrary practice, the Courts of law ought not to be strictly confined within the boundaries of a power purely executive? But, even in that case, as they must be the expounders of the law, and as it is difficult to frame any law which does not admit of great latitude in its interpretation, they must still, to a certain extent, exercise a discretion which, on many occasions, will appear to trench on the Legislative authority. And it is always to

notorious possession on entry, [and there is a privity between him and the lessor,] and the

be kept in mind that the greater part of our law has been formed in the Courts, without the interference of the Legislature, by an application of the principles of the preceding decisions, to the successive cases that arose, and that these principles must be applied by the Courts in the expounding of any positive law, where they are not absolutely abrogated by, and repugnant to, its enactments. The Courts in raising a constructive tenancy from year to year, instead of an estate at will, in all cases where the acts of the parties, independently of any actual agreement between them, would afford ground for implying an agreement, that such a tenancy should exist, appear to have been influenced chiefly, as *Mr. Watkins* has stated in the text, by the consideration of the inconvenience attached to a strict tenancy at will. When therefore they had by their decisions, in cases where there was no immediate reference to that part of the Statute of Frauds which relates to parol leases, established the circumstances from which the tenancy from year to year should be implied, the question was, whether the principle which governed those cases could be applied to the case of a parol lease which was void by that statute? and the Courts determined that they could. The grounds of this determination appear to be, that the object of the statute was principally to render invalid any parol agreement for a lease for a longer term than three years; and as the constructive tenancy from year to year, arising from the mere possession at an annual rent, was not then established, the statute could only refer to a tenancy at will, when it avoided the actual agreement between the parties: but after the tenancy from year to year was raised by implication of law from the acts of the parties, the Courts did not feel that they violated the intention of the statute in giving the same effect to the possession and payment of rent by a

reversion or inheritance may be released to such an one.*

person who entered under a parol lease void by the statute, which they would have done, had the same circumstances occurred unconnected with such parol lease, and they therefore felt themselves bound by the prior decisions to put the same construction upon those circumstances, as evidence to infer an agreement for a tenancy from year to year, notwithstanding the agreement between the parties, which in consequence of the statute could not be taken into consideration. They do not therefore give any effect to a parol lease which the statute has rendered null, but merely presume, consistently with their decisions in other cases, an agreement for a different kind of tenancy, where the facts of the case will warrant that construction. And it should seem that in conformity with these principles they would construe a possession taken under a parol lease void by the statute, as a strict tenancy at will, where no act is done by the lessor, by acceptance of rent, or otherwise, to raise by implication a tenancy from year to year; but where such acts take place that tenancy will be implied. [4 *Vo. & Coll.* 399; 10 *Mee. & W.* 494].

* It appears that the acceptance by a lessee for years, of an estate at will, in the land comprised in his lease would, be a surrender in law of his term, *Mellows v. May, Cro. Eliz.* 874, and 6 *Com. Dig.* 306. It is also to be observed that a remainder cannot be limited on an estate at will; for by the limitation over, the will of the lessor is determined; and then the remainder cannot be good, as a remainder, for want of a particular estate; and it cannot be good as an estate in possession, because it was granted as a remainder, 5 *Bac. Ab.* 822, tit. remainder G.

*Bernard v.
Bonner, Aleyn,*
58.

Since the Courts have favoured the constructive tenancy from year to year, there are few instances now, in which proper tenancies at will exists; but that estate has by no means been abolished, and will arise *first*, where there is an express letting at will, *Richardson v. Langridge*, 4 Taunt. 128. *Secondly*, where the raising a tenancy from year to year by implication alone would make a forfeiture; for there the implication is stronger that the lessor did not mean to commit an act which would forfeit his estate, than that he intended to lease from year to year; and because, as has been observed in the text, a mere construction of law shall not be allowed where it will work an injury. And *thirdly*, where there is an entry with the consent of the legal owner of the land, but no express agreement or conveyance which will confer a legal interest, nor any payment of rent to raise a constructive tenancy from year to year: the last branch includes an entry under a deed of feoffment before livery of seisin, *Litt. s. 70*; entries under other defective assurances; for distinction on which head see third resolution in *Buckler's case*, 2 Co. 55, b.; and also, it is presumed, entries under contracts for leases, where rent has not been paid, or for the purchase of estates, and the cases of a mortgagor and *cestui que trust*, when in possession.

As to different relations which may legally subsist, between a mortgagor and *cestui que trust* in possession, and the mortgagee and trustee, according to the circumstances which may take place, and the possession of persons entering under contracts for leases, or purchase, have not, as we are aware of, been considered and brought into one point of view in any of the books, and as the cases on these points are in some degree contradictory, or at least obscure, it is thought that a few observations on each separately in this place will be useful to the student, though the discussion may lead us in some measure beyond the immediate object of this chapter.

1. *The case of a mortgagor in possession.*

The cases are rather confused as to the character in which a mortgagor in possession is to be considered; in some he is called tenant at will, in others tenant at sufferance, and in some he is viewed in the light of a receiver. The point may not be of any material consequence, further than as it is important in all cases that a construction should be adopted consistent with the general principles of law; and as the privity which may exist between the mortgagee and a mortgagor in possession, in consequence of a tenancy being considered as subsisting between them, may materially affect the operation of a conveyance from the former to the latter.

The following remarks are therefore intended as an attempt to elucidate the different characters in which a mortgagor in possession may be considered:—*First*, Where the mortgagor is himself the occupant, and there is an express agreement that he shall continue in possession till default in payment of the mortgage money at a particular period; he may in the mean time be considered as a tenant to the mortgagee, holding a legal interest of the nature of a term of years during such period. [This was decided by the case of *Wilkinson v. Hall*, 3 Bing. N. S. 508. There, lands were mortgaged in fee redeemable, on payment of the principal money and interest in June 1833; but it was provided that if the interest were regularly paid, the principal should not be called in until 1840. The mortgage deed contained the usual clause, that, until default, the mortgagor should hold the premises and receive the rents for his own use. The Court of C. B. held that this amounted to a demise from the mortgagee to the mortgagor until 1840. The premises were in the occupation of tenants holding by the quarter.] *Secondly*, If, where there is an agreement for possession by the mortgagor till after default in payment, the money is not paid, and the mortgagor being the occupant, continues in possession after the time fixed for payment, without any new agreement between him and the mortgagee, he may, until payment of interest, be considered either as a tenant at

Observations
on the estate of
a mortgagor in
possession.
See *Birch v.*
Wright, 1 T. R.
378, and the
cases cited
below.
2 J. & W.
183. 553.

Argument in
Powseley v.
Blackman, Cro.
Jac. 659.
Per *Holt*, in
Smartle v. Wil-
liams, 1 Salk.
245. *Christo-*
pher v. Sparke,
2 J. & Walk.
234.

Keech v. Hall,
1 *Doug.* 22.

Smartle v. Wil-
liams, 3 *Lev.*
387, and 1 *Salk.*
245.
Thunder v.
Belcher, 3 *East*,
449.

Per *Holt*, in
Smartle v. Wil-
liams, 1 *Salk.*
245.

Holland v.
Hatton, Carth.
414, and 10
Vin. Ab. 418.
pl. 19.

Moss v. Gal-
limore, 1 *Doug.*
283.

sufferance to the mortgagee, [or be treated by him as a trespasser, *Doe v. Maisey*, 8 *Bar. & Cres.* 767; and the mortgagee having a power of entry and sale may eject the mortgagor without notice to quit, or demand of possession, *Doe v. Giles*, 5 *Bing.* 421, *Hitchman v. Walton*, 2 *Mees. & Well.* 409.] *Thirdly*, If there be no express agreement originally, as to the period of possession and the mortgagor,* being the occupant, remain in possession with the consent of the mortgagee, it should seem that in such case he ought to be considered strictly as tenant at will. *Fourthly*, In the latter case, the transfer of the mortgage by the mortgagee, without the concurrence of the mortgagor, would be a determination of the will, and the mortgagor would become tenant at sufferance to the assignee, until payment of interest. And wherever the mortgagor is to be considered as tenant at will, the death either of the mortgagor or mortgagee determines the estate. In the case of the death of the latter, it is apprehended the mortgagor becomes tenant at sufferance to the representative of the mortgagee, until payment of interest; but in case of the death of the mortgagor, if his heir or devisee enters, and holds, without any recognition of the mortgagee's title, by payment of interest or any other act, an adverse possession takes place. *Fifthly*, In all cases where a tenancy at sufferance would exist between a mortgagee and mortgagor, and also where even an adverse possession would commence, as by the entry of the heir or devisee of the mortgagor, without the consent of the mortgagee, it is apprehended the payment of interest would be a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor or person deriving title from him should hold at will, and a strict tenancy at will would then commence. *Sixthly*, Where the estate is in the occupation of tenants, and the mortgagor is left merely in the receipt of

[* A mortgagor in possession and *cestui que trust* are excepted from the operation of the 7th section of the stat. 3 & 4 *W.* 4, c. 27.]

the rents, [there being no clause in the mortgage deed that the mortgagor may hold and receive the rents until default, as in *Wilkinson v. Hall*,] it is apprehended no actual tenancy arises between him and the mortgagee, but he is to be considered merely as a receiver, without liability to account. *Ubi supra.*

In all the instances before mentioned, where an actual tenancy subsists between a mortgagor and a mortgagee, the former according to the nature of his tenancy arising from the several circumstances before mentioned, is placed in the same relation to the mortgagee; and it is apprehended with the same privity, where a privity is by law attached to the tenancy, as an indifferent person would be placed in and possess, under the like tenancy; and though it would not be advisable in practice to rely on the existence of such privity as the foundation of a conveyance between the parties, yet it is submitted that it may be fairly urged in support of a title where circumstances require the aid of such an argument. It is to be observed, however, that where a mortgagor is considered as tenant at will, there is this difference between him and other tenants of that description. *First*, He is not entitled to emblements, because the right to emblements arises from the equity recognised by law as subsisting between the parties; and the mortgage debt being a charge which the mortgagor ought to pay, there is no equity for him as against the mortgagee, that the emblements should not go in discharge of the debt. *Secondly*, He may be ejected by the mortgagee, without any previous determination of the will. The reason for which seems also to depend upon the relative situation of the parties; for whilst he is in possession, he receives the whole profits, without any compensation to the mortgagee beyond the interest of the money secured, which however cannot be considered in the nature of a rent.

In *Birch v. Wright*, 1 T. R. 382, the relation of the mortgagor and mortgagee is very elaborately entered into by *Mr. Justice Buller*, who, in his judgment, argues that there is no actual tenancy between them, when the mortgagor is in possession. But an examination of the cases certainly shows *Birch v. Wright.*

Partridge v. Bere, 5 Bar. & Ald. 604. *Hall v. Surtees*, Ib. 687.

that the Courts of law have considered a tenancy as subsisting where the circumstances allow of such a construction, and it is submitted that they cannot take into consideration the *equitable* relation of the mortgagor and mortgagee, further than in the points already noticed; their jurisdiction, with regard to the possession of real property, and the title to it, except in the case of actual fraud, being confined to the *legal* estates and rights of individuals.

It may be observed here, that the Court of Chancery will, by injunction, restrain a mortgagor in possession from committing waste. *Per Lord Hardwicke* in *Farrant v. Lovel*, 3 Atk. 723, which perfectly accords with the legal relations in which we have considered him.

II. *The case of cestui que trust in possession.*

Observations
on the estate of
a *cestui que*
trust in pos-
session.

In equity, the person beneficially interested, who is called the *cestui que trust*, is considered as the real owner of the estate, and the possession of the trustee is always considered as that of the *cestui que trust*; but at law the trustee alone must be considered as the tenant according to the quantity of his estate; so far even, that where his estate is in fee-simple, it would be subject to escheat on failure of his heirs [previously to the stat. 4 & 5 W. 4, c. 23. But now by the second section of that act, it is enacted, that where any person seised of any land upon any trust, or by way of mortgage, dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in the manner provided by the stat. 11 G. 4, and 1 W. 4, c. 60, s. 3, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there had been such heir. The third section provides, that lands, vested in any trustee or mortgagee shall not be subject to escheat or forfeiture by reason of their attainder or conviction. The statute 1 & 2 Vict. c. 69, was passed to amend the 1 W. 4, c. 60, and to extend its provisions to the heir and devisee or other real representative of

[See 7 & 8 Vict.
c. 76, s. 9.]

mortgagees not having been in possession or receipt of the rents of the mortgaged estate, and to whose executor or administrator the mortgage money shall have been or shall be paid. By the 7 & 8 *Vict. c. 76, s. 9*, the executor or administrator of a mortgagee is empowered on discharge of the mortgage to convey the legal estate vested in the heir or devisee or other assign of such heir or devisee.] The *cestui que trust*, therefore, being in the possession of the estate, with the consent, or even the mere acquiescence of the trustee, must be regarded as his tenant at will, in order to preserve a consistency between this case and the general principles of law. The following reasons may be given in support of this construction, and may assist the student in tracing the principles upon which a constructive tenancy at will may be contended for in other instances, where a mere possession is taken with the consent or acquiescence of the person entitled to give it. It may be urged, that in every case where the bare possession is in one person, and the immediate legal estate, either of a freehold nature, or for a term of years, in another, such possession must legally be considered, either as derived from the estate which the law recognises as subsisting, or as adverse to it. If the possession in the instance before us were to be considered as adverse, the *cestui que trust* would be viewed as gaining the fee by disseisin and the estate of the trustee would then be turned to a mere right. This construction, however, would, in many instances, defeat the object for which the trust was created, and would often give the *cestui que trust* a greater estate at law than he previously had in equity; and it appears to be completely excluded where the possession is acquired, or continued with the concurrence or acquiescence of the trustee. Besides the disseisin must, in this, as in any other case, be considered as a wrong in a Court of law, notwithstanding the equity subsisting between the parties; and the Courts will not presume a wrong where any principle can be raised to support the possession as lawful, and much less against the manifest intent of the parties. But to make the possession lawful, some tenancy must be raised; and the only one which can be

See 4 *Bac. Ab* 198, and the cases of *Smith v. Pierce*, 3 *Mod.* 195. *Focus v. Salisbury, Hard.* 400. *Freeman v. Barnes*, 1 *Vent.* 55. 80. and 1 *Lev.* 270, there cited; and *Pomfret v. Windsor*, 2 *Ves.* 481.

resorted to is a tenancy at will. This preserves the interest of the *cestui que trust*, and the estate of the trustee; and answers the intention of the parties without producing any injury, further than the inconvenience which always attends the placing of the legal estate in another person.

Regarding, therefore, the *cestui que trust* in possession as tenant at will to the trustee, we have further to consider how this tenancy is affected by the death of the parties: for if a tenancy at will be raised, it must be attended with the consequences attached to that tenancy as to its determination; and the death either of the trustee or the *cestui que trust* must determine the estate at will subsisting between them. In the case of the death of the former, a tenancy at sufferance may either be considered as existing between the real or personal representative of the trustee, according to the quantity of his estate, and the *cestui que trust* or both in that case, and in the instance of the death of the *cestui que trust*, a new tenancy at will may be raised between the parties succeeding to the title, or possession, on the ground of an implied agreement between them, where no act is done to evidence an intention of adverse possession. For though the Courts may set their faces against raising a tenancy at will by construction, where it produces inconvenience, there is no reason why they should oppose such a construction where it is beneficial, and preserves a uniformity with the general principles of law. And in the latter instance, either a new tenancy at will must be raised, or the possession must be treated as adverse, to the injury in many cases of persons interested under the trusts. It is apprehended that where there is an actual recognition of the estate of the trustee, a new tenancy at will must be raised; but it is difficult to say what acts are to be considered as recognising such estate, there being no payment of rent, or interest, between the parties, and probably no other act required at the time which would imply a recognition. It seems, therefore, in these instances more conformable to the intent of the parties, and to the views of justice, to raise by implication a legal tenancy between them, on the ground of an assumed recog-

nition of title, unless there be some act which demonstrates a contrary intention, rather than to require actual evidence that the title was recognised, and possession taken or continued with the consent of the trustee, and, in the absence of such proof, treating the possession as adverse. The application of this principle may, however, require to be admitted with some modification ; and there may be instances in which it would not be proper to act upon it, as where a legal estate, or particular trust estate, has been left outstanding for a considerable length of time, without treating it as existing in another person, and especially where the trust was originally created for a particular purpose, which has been satisfied. But it is apprehended that even in such cases, the union of the legal and equitable title, or the title to the possession, is rather to be founded on the presumption of a conveyance of the legal estate, or surrender of the particular trust estate, than on the ground of the acquisition of a seisin adverse to it.

It is to be observed, that the above discussion applies only to the case where the *cestui que trust* is the actual occupant of the estate, and not the mere receiver of the rents. There does not appear any reason why the receipt of rent alone should give any greater right to a *cestui que trust* than any other person ; and the receipt of rent will not, of itself, create any tenancy, nor [did it, previously to the 3 & 4 W. 4, c. 27, s. 9,] confer any right to, or divest any estate in, land. It is further to be remarked, that, though the possession of the trustee is always to be considered as that of the *cestui que trust*, and that a possession cannot be raised in the former adversely to the latter, so as to bar him in equity ; yet the *cestui que trust* may, by acts clearly manifesting such an intention, gain a legal possession adverse to his trustee ; and such acts will operate in the same manner against the estate of the trustee, and be attended with the same consequences as if no equitable relation subsisted between the parties : in such cases, therefore, there is no room for the application of the reasoning on which the above observations are founded.

*Litt. s. 588.—
591 and Com-
ment.*

III. *Entries under contracts for the purchase of estates, for leases, &c.*

Observations
on an entry un-
der contracts
for the pur-
chase of es-
tates, agree-
ments for
leases, &c.

From the principles we have been discussing, it also seems to follow as a consequence, that an entry by a person under a contract for the purchase of an estate, or an agreement for a lease, with the consent of the vendor, or the person agreeing to grant the lease, must raise a strict tenancy at will between them. In this instance also the possession must, as we have before observed, either be referred to some legal title, or be held adverse; and the latter it cannot be, where the entry is with the consent of the person entitled to the possession: on the other hand, the contract or agreement confers no legal estate; one must therefore be raised by construction of law, from the acts of the parties; and no other estate than a tenancy at will can, it is apprehended, accord with their situation: whilst there is nothing in such a situation, or in the existence of any equitable right between them, arising from their contract or agreement, inconsistent with this estate, until either the contract or agreement is carried into execution, or some legal foundation is laid, by payment of rent, or other act, for implying another tenancy.

Right v. Beard,
13 *East*, 210.
Doe v. Jackson,
1 *Barn. & Cress.*
448. *Doe v.*
Sayer, 3 *Camp.*
8.

The case of *Right v. Beard*, 13 *East*, 210, has decided that a person entering under a contract for the purchase of an estate, with the consent of the vendor, cannot be ejected without a demand of the possession, or the commission of some wrongful act to determine his lawful possession; but he was not directly considered as holding at will. It is, however, submitted, for the reason before stated, that he must be considered in that character, and that his possession cannot, on any other ground, draw to itself the consequences which were in that case considered as legally attached to it.

[*Doe v. Rock*,
6 *Jurist*, 266.
4 *Man. & G.*
30. *Car. & M.*
549.]

[In *Howard v. Shaw*, 8 *Mee. & W.* 122, the Court of Exchequer were of opinion that a person entering under a contract for purchase was a *tenant at will*, both before and

after the contract went off, but that he was liable to an action for use and occupation, during the time he was in possession, after the contract went off.]

With regard to an entry under an agreement for a lease, the judgment in *Hegan v. Johnson*, 2 Taunt. 148, may be considered as at variance with the construction of a tenancy at will. The occupier had there been in possession three quarters of a year, under an agreement for a lease, without payment of rent; and the Court is reported to have held, that he was not tenant from year to year; and that if before the end of the first year a lease were tendered to him, and he refused to execute it, the lessor might eject him without notice; and that, when a person was so foolish as to enter under an agreement for a lease, without a stipulation, that, in case no lease was executed he should hold for one year certain, the landlord might, if he did not execute, turn him out without notice; and that the effect was, that the lessor could not distrain for the rent, he must bring his action. This certainly was saying there was no tenancy at all existing between them; for if there were only a tenancy at will, the landlord might distrain for the rent, and could not eject the occupier without a previous demand of possession, or, in other words, a determination of the will by a notice to quit. But it is submitted, that the latter point was not before the Court, and that the opinion given on it is in direct opposition to the later decision in *Right v. Beard*; for where the agreement on which the tenant is put into possession confers no legal title, the nature of such agreement, whether relating to the purchase of a fee, or the grant of a lease, is immaterial, with reference to the legal construction which is to be put upon the bare fact of possession being taken with the consent of the person legally entitled to give it. The determination, therefore, in *Right v. Beard*, must, it is conceived, be considered as having settled that point. As to the point immediately before the Court, in *Hegan v. Johnson*, that of the distress, it was argued on the ground

Hegan v. Johnson, 2 Taunt. 148; and see *Dunk v. Hunter*, 5 Barn. & Ald. 322.
Doe v. Lawder, 1 Stark. 308.

Litt. s. 72.

only of a tenancy from year to year, which the agreement did not support, and there were no circumstances in the case to raise it by implication; but the existence of a tenancy at will was neither mentioned in the argument, nor adverted to by the Court, except so far as the judgment may be construed as negating such a tenancy. If, however, there was not a tenancy at will, there was no tenancy at all; and if the case is to be considered as deciding that no tenancy existed, it must be on the ground, either that a possession taken with the consent of the person legally entitled to give it may be adverse to the title of such person, or that a possession which is not adverse, and is not that of a mere bailiff, in the modern import of that word, may legally exist, without any tenancy between the occupier and the person giving possession, neither of which positions, it is submitted, can be maintained, consistently with the English law of real property, and the doctrine of tenure on which it is founded. The case of *Hegan v. Johnson*, therefore, it is conceived, cannot be received as an authority against a constructive tenancy at will being raised on an entry with consent under an agreement for a lease: and there appears nothing in the circumstances connected with such an entry to make any difference between it and other entries with consent, where no freehold is claimed, and no actual estate is granted which have always received the construction of tenancies at will. This, indeed, is the general principle which governs all the particular instances we have been considering, and which must, it is presumed, govern all cases where it can be applied, whatever may be the peculiar circumstances of each case to make it different in other respects. It may also be observed, that there does not appear any reason why the Court should not in all cases raise by construction a tenancy at will, from the mere fact of an entry with consent, so long as there are no other circumstances to alter that construction, notwithstanding the existence of any agreement between the parties, connected with such entry, referring to the grant or conveyance of a greater estate, in the same manner as they

See *Adam's Eject.* 98, and *Cham. L. & T.* 17.

See *Blunden v. Baugh, Cro. Car.* 302. *Co. Litt.* 270, b. and 4 *Comyn's Dig.* 58.

have raised a constructive tenancy from year to year, from the circumstance of the payment of an annual rent, where [6 *Jurist*, 976.] the agreement of the parties has had a reference to a larger estate.

[A person entering under an agreement signed by the owner, undertaking to execute a lease, is tenant at will until he pays rent, either for a year or some portion of time having reference to a year; after which he becomes tenant from year to year. *Braithwaite v. Hitchcock*, 6 *Jurist*, 976, Exch., see also *Howard v. Shaw*, 8 *Mee. & W.* 118—122, see the stat. 7 & 8 *Vict. c.* 76, s. 4.]

In forming a judgment on an estate at will, the student should be careful not to confound that tenancy with the tenancy from year to year, which has almost superseded it, and which in many of the cases, and in many books, is improperly called a tenancy at will. The tenancy from year to year is, however, a distinct tenancy, partaking of the nature of a term of years, with its own peculiar qualities attached to it relating chiefly to the mode of determining it. An estate at will, where it actually subsists, is still governed by the same principles as formerly: and where from particular circumstances a tenancy from year to year is raised by construction of law, such estate, whatever the estate from which it is raised may have been originally, can no longer be called an estate at will without introducing a confusion of terms.

See a remarkable instance in *Parker v. Constable*, 3 *Wils.* 25. See the next chapter in *notis*.

TENANCY BY SUFFERANCE.

IN the preceding observations we have had occasion to notice a tenant at sufferance; and a few remarks on the nature of that tenancy may be necessary, as *Mr. Watkins* has

2 *Black. Com.* ch. 9, p. 150. *Co. Litt.* 57, b. 4 *Comyn's Dig.*

66. *Tit. Est.*
(1).
10 *Vin. Ab.*
414—420.
1 *Rolle's Ab.*
861.
1 *Cruise's Dig.*
tit. ix. c. 2,
ed. 4.

omitted any mention of it. A tenancy at sufferance is the lowest estate which can subsist; it arises where a person has held by a lawful title, and continues the possession after his title is determined, without either the agreement or disagreement of the person then entitled to it. As where a tenant at will continues in possession after the death of the lessor, or a lessee for years holds over after the expiration of the term, or a tenant for another man's life keeps possession after the decease of the person for whose life he held, in all these cases the tenant remaining in possession, without the consent or dissent of the person entitled to enter, becomes tenant at sufferance to the latter. This tenancy, therefore, can arise only by construction of law, and cannot originate in the agreement of the parties, the law presuming only that the possession is continued by the permission of the person entitled to it. If such person actually agree to the continuance of the possession, a tenancy at will, or from year to year, will arise between them, according to the nature of the agreement; and the payment of an annual rent, where there are no circumstances attending the payment and receipt of it to oppose such a construction, will also raise a constructive tenancy from year to year: but so long as the occupation is merely continued with the bare acquiescence, or without the disagreement, of the person entitled to the possession, a tenancy at sufferance subsists. It follows from this statement, that there is not any privity between a tenant at sufferance and the person entitled to the possession: and, consequently, a release from the latter to the former will not operate to enlarge his estate. [In *Barry v. Goodman*, 2 *Mee. & W.* 768, an instrument in these terms: "I hereby certify that I remain in the house *A.* belonging to *W. G.* on sufferance only, and agree to give him immediate possession at any time he may require," was holden not to amount to an agreement for a tenancy, so as to require a stamp.]

Roe v. Ward,
1 *H. Black.* 97.
Doe v. Watts,
7 *T. R.* 83.
Bishop v.
Howard,
2 *Barn. & Cress.*
100.

Sykes d. Murgatroyd and Wilkes v. —
cited 1 *T. R.*
161.

Co. Litt. 270, b.

Butler v.
Duckmanton,
Cro. Jac. 169.

Co. Litt. 57, b.
Smartle v. Williams, 3 *Lev.*

This estate cannot, from the nature of it, be the subject of conveyance or transmission, any more than an estate at will;

while it subsists, the possession of the tenant is not adverse to the title of the person entitled to enter; although such person may, if he chooses, consider it so. This may, perhaps, be one reason why the law raised the tenancy, as particular estates may often determine, and the reversioner remain ignorant that they have ceased; and if in such cases the mere continuance of possession by the tenant were held adverse, the reversioner might be barred of his remedy by lapse of time, before he even knew of his right to enter. The raising of a tenancy at sufferance prevents this; and preserves his right of entry, so long as the same tenant continues in possession, and commits no wrongful act, inconsistent with the admission or existence of the title of the reversioner. The descent or conveyance of the reversion does not appear to affect the tenancy; but the entry of any person claiming title from the tenant, and without the consent of the reversioner, in the event of the death of the tenant, or in consequence of his alienation, would be adverse, as they cannot derive a lawful title from him. An attention to these points may be important in many cases; for instance, where a tenant for life [before the statute 7 & 8 *Vict. c. 76*] attempted to alien in fee by a conveyance which did not operate as a forfeiture, as by lease and release, or bargain and sale, which conveyances would only, in fact, pass his life estate: the person, therefore, in possession under them at the death of the tenant for life would become tenant at sufferance to the reversioner, and adverse possession will commence only from the commission of some wrongful act by the tenant, or from the change of the tenant of the land, in consequence of death or alienation.

In the case of the crown there is no tenancy at sufferance; and if the king's tenant holds over, he is an intruder: but, on the other hand, there was not, at the common law, any limitation to the claim of the crown; and the rule *nullum tempus occurrit Regi* preserved the title of the crown in all cases prior to the statutes 21 *Jac. 1, c. 2*, and 9 *Geo. 3, c. 16*.

387; but consider *Fishar v. Prosser*, *Cowp.* 218. *Roe v. Ferrars*, 2 *Bos. & Pul.* 542, and *Doe v. Pettet*, 5 *Barn. & Ald.* 223.

Smartle v. Williams, *ubi supra*.

Co. Litt. 57, b.
Co. Litt. 41, b. 294, b.
1 *Black. Com.* 247.

Doe v. Perkins,
3 *Muul. & Sel.*
271.

It is perhaps necessary in this place to offer a few remarks to the student on the case of *Doe v. Perkins*, determined in the Court of King's Bench, as bearing on the point when adverse possession is to be considered as arising after a tenancy at sufferance has taken place. The circumstances of the case were, a tenant *pour autre vie* continued in possession six years after the death of the person for whose life he held without payment of rent, and then died; on his decease, his son entered, and continued in possession more than a year, without payment of rent, or having any demanded of him; he then levied a fine, and afterwards remained in possession some years without paying any rent; an ejectment was then brought against him by the person entitled to the reversion on the death of the tenant for life, and the Court determined that no actual entry was necessary on his part to avoid the fine levied by the person in possession. The counsel who argued the case appear, from the report, to have considered the person in possession as tenant at sufferance; or, at furthest, the counsel for the defendant only urged the possession as adverse on the ground of a descent being cast, a point which certainly could not be maintained, for a descent which confers an adverse possession must be from a person whose possession was also adverse. But in this case the possession of the father was clearly a tenancy at sufferance after the decease of the person for whose life he held; and, consequently, not adverse to the title of the reversioner. The Court also appears to have treated the possession of the son as a tenancy at sufferance, and seemingly as a continuation of the possession of the father. This case, therefore, if it is to be received as an authority, is directly opposed to the proposition that the entry of a person without the consent of the reversioner or the death of a tenant at sufferance is adverse to the title of such reversioner. But it is with deference submitted, that this decision, and the principles laid down in all the law books as the foundation of a tenancy at sufferance cannot stand together. It appears to be essential

Co. Litt. 57, b.
Rous and Ar-
tois case, 2
Leon. 47, and
Berry and
Goodman's
case, *ib.* 147.

to the raising of a tenancy at sufferance that the person in possession should have originally held by lawful title. And it is clear that, as a tenant at sufferance has nothing but the bare possession without any title, he has no estate which he can convey, or which can descend. A person, therefore, entering under his conveyance, or on his death, cannot be considered as continuing the possession of such a tenant; and as the entry of such person is not by lawful title, he cannot become tenant at sufferance on his own possession. Now the entry of the son in the above case was either by lawful title or wrongful; if by title, it must have been derived either from his father or the reversioner; but his father had no descendible estate, and it is admitted that he entered without the agreement of the reversioner. Under such circumstances, it does not appear how this entry could be otherwise than by wrong, and then he could not become a tenant at sufferance.

[*Doe v. Thompson*, 2 Nev. & Per. 656.]

If, however, the possession of the son could not be treated as a tenancy at sufferance, it is to be considered on what other ground it could be placed to avoid the consequence of its being adverse. On this point it is conceived, that every possession which is continued for a length of time, and accompanied with an actual perception of the profits, must, in order to reconcile it with the title of the freeholder, be referred to the existence of some tenancy, either by express contract, or by construction of law, between the latter and the person in possession; and if such a tenancy cannot be proved, the possession must, it is presumed, be considered as adverse, unless we are to admit that, at the present day, no possession can be acquired adversely to the freeholder. It is true that entry alone will not create a disseisin or intrusion, it must be accompanied with some act which the law construes as an ouster of the freeholder: such as claiming or taking the profits contrary to his title: but where there is an entry which is not congeable, and a claimer or a taking of profits, such entry is adverse. In the above case there was an entry without any title, and the possession was held,

and the profits taken for years, without the recognition of the title of any other person ; and the very levying of the fine was, it is conceived in this instance, coupled with the entry, a claimer of the freehold. Such a possession could not be referred to any subsisting tenancy ; it was admitted there was none by the agreement of the parties, and we have shown that none could in such a case be raised by construction of law ; the entry and possession cannot, therefore, it is apprehended, consistently with any recognised principles of law, be considered in any other light than tortious and adverse. And it is submitted that the case cannot be acted upon as an authority against the proposition advanced in the above observations, that an adverse possession will take place on an entry and perception of profits by a person without the consent of the reversioner after the death of a tenant at sufferance.

CHAP. II.

OF A TERM OF YEARS.

THE next estate with respect to the duration of interest, is that which the law denominates *a term*;* and it is so denominated because its duration is *absolutely defined*. The duration of an estate at will is dependent *upon the pleasure of each party*; and an estate for life, in tail, or in fee, is uncertain in its duration, as its con-

2 *Bl. Com.* c. 9, s. 1, pp. 140—145, and c. 20, p. 31. *Litt. b.* 1, c. 7, and the *Com. Touchst.* 266, ch. 14. *Bacon's Abr.* tit. Lease. 4 *Comyn's Dig.* 45, tit. Est. (a).

* And every tenancy of a definite duration is a term, and of the nature of a term of years, though for a less period than a year, *Litt.* 67. And a tenancy from year to year, though raised by construction of law, appears to partake of the same quality: it is transmissible to the personal representatives, who are entitled to the same notice to quit as the original lessee, *Doe v. Porter*, 3 *T. R.* 13, and per *Lawrence, J.* in *Rex v. Stone*, 6 *T. R.* 298, and the Courts of Equity will fasten a trust upon the interest which devolves to the personal representatives, *James v. Dean*, 11 *Ves.* 383, and 15 *Ib.* 236. It is also assignable, where there is not any special agreement to the contrary; and an assignment of it is within the 3d section of the Statute of Frauds, and must be in writing, *Botting v. Martin*, 1 *Camp. Ca. N. P.* 317, as must also a surrender of it for the same reason, *Mollett v. Brayne*, 2 *Ib.* 103, and *Doe v. Ridout*, 5 *Taunt.* 519, but see *Whitehead v. Clifford*, *Ib.* 518, except where it arises by act and operation of law;

Doe v. Roe, 5 *Barn. & Ald.* 766. Tenancy from year to year.

Thompson v. Wilson, 2 *Stark* 379.

10 *Vin. Ab*
319. 1 *Rolle's*
Abr. 846.
1 *Cruise's Dig.*
4th ed. 222.

tinuance is dependent upon an uncertain event :
that is, upon the death of the individual, or the

Doe v. Roe,
5 *B. & A.* 770.

[See 7 & 8
Vict. c. 76].

as where another becomes tenant with the assent of both the original lessor and lessee, *Thomas v. Cook*, 2 *B. & A.* 119, *Stone v. Whiting*, 2 *Star.* 236. [Now by 7 & 8 *Vict. c.* 76, a surrender in writing must be by deed, s. 4.] And this species of estate is not within the late act 1 *Geo.* 4, c. 87, as to holding over, unless the agreement to let be in writing. An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms for years, and from estates at will, are, that it is now raised by construction of law alone, instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest; and that, whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them, *Birch v. Wright*, 1 *T. R.* 380; and the assigns, or real or personal representatives of the former, according to the quantity of his estate, and the assignee, or personal representatives of the latter, still continue the tenancy upon the original terms, and subject to the same conditions which the law, or the express agreement of the parties, has attached to it. But it is liable at any time to be determined by a notice to quit, from either party, which, where there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing

extinction or failure of heirs, either special or general. Hence, then, must a term, from its very

from the time when the tenancy commenced, *Right v. Darby*, 1 *T. R.* 159. And a parol notice is sufficient, unless the agreement requires it to be in writing, per *Lord Ellenborough*, C. J., in *Doe v. Crick*, 5 *Esp. N. P. C.* 197 ; but for the sake of evidence it is always advisable to give a written notice. Where different parts of an estate are let from different periods, without any agreement as to the time when the whole is to be considered as let together, the commencement of the year, with reference to the notice to quit, will be computed from the entry on that part which is considered as the substantial or principal object of the demise ; *Doe v. Spence*, 6 *East*, 120, *Doe v. Watkins*, 7 *Ib.* 557, and which is a fact for the determination of the jury, where it is disputed, *Doe v. Howard*, 11 *East*, 498. In cases where the commencement of the tenancy cannot be ascertained, a notice served personally on the tenant, requiring him to quit at the end of the year, regulated by the times of the payment of the rent, will be *prima facie* evidence of the commencement of the tenancy at such period, unless the tenant actually prove the contrary, or object to the notice when served on him, *Doe dem. of Leicester*, and others, v. *Biggs*, 2 *Taunt.* 109, *Doe v. Forster*, 13 *East*, 405, *Doe v. Woombswell*, 2 *Camp. N. P.* 559, and *Thomas v. Thomas*, *Ib.* 647. But if the notice in such a case be not personally served on the tenant, it will not of itself be received as sufficient evidence of the commencement of the tenancy, *Doe v. Forster*, *ubi sup.*, and *Doe v. Culvert*, 2 *Camp. N. P.* 388. Where the tenant informs his lessor of the time of the commencement of the tenancy, he will be bound by a notice given by the lessor to him according to his own statement, although such statement was wrong unintentionally, *Doe v. Lambly*, 2 *Esp. N. P.* 635. And where the commencement of the tenancy is not known, and the lessor cannot, from the objection of the tenant to the

Doe v. Donovan, 2 *Camp.* 78.
Kemp v. Derrett, 3 *ib.* 510.

nature, have a certain beginning, or definite commencement, and a certain or definite period beyond which it cannot last.* But though it be

notice, or any other cause, avail himself of the periods of the payment of the rent as presumptive evidence of the commencement of it, a notice from him requiring the tenant to quit, at the expiration of the current year of the tenancy, which shall expire next after the end of half a year from the date of the notice, will be sufficient, *Doe v. Butler*, 2 *Esp. N. P.* 589. But it seems advisable in such a case to give the notice on one of the quarter days on which the rent is payable, and not to bring an ejectment before the expiration of a year and a quarter from the date of the notice, in order to be certain that the year of tenancy has expired. It is to be observed that when a notice to quit has been given, the acceptance by the lessor or his agent, of rent which accrues due subsequently to the determination of the tenancy according to the notice, will be a waiver of the notice, unless, in the case of an agent, he was ignorant of the notice having been given, and had no special authority to receive the particular rent, *Doe v. Calvert*, *ubi sup.* As a tenant from year to year has, after entry, a possession with a privity, he is capable of receiving a release by way of enlargement of estate from his lessor.

* The commencement of leases for years may be considered either with regard to the time of the computation of the term, or the commencement of the interest. The certainty of the time of computation may be fixed by reference, either to the time of the making of the lease, or to a past or future period, or a past or future event; and the event, if future, may be contingent; or such time may be referred to the nomination of a third person, in which case it must be fixed in the lifetime of the parties to the lease. When no time of computation is referred to, or the time referred to is an impossible date, or where a lease is made to begin from the end of a lease which

essential to its very existence that there be a time absolutely prefixed *beyond which it cannot continue*, yet it may be made subject to a condition [depending on the dropping of any life or lives, or on any other contingent event,] for its determination before the period prefixed : as for ninety-nine years, if *A. B. lives so long*. Here, if *A. B.* die before the ninety-nine years expire, the term shall cease : but though *A. B.* should survive the ninety-nine years, the lease, on the expiration of the ninety-nine years would be absolutely at an end.

The grant of such an estate is usually entitled *a demise or lease* ;* and the proper words of

is misrecited, the commencement will be computed from the delivery of the lease. The commencement in interest, when the time of computation is immediate, or from a past period, may either begin immediately, or be postponed to take effect at a future period, or on a future event, either absolute or contingent ; but when the time of computation is from a past period, the commencement in interest cannot be retrospective so as to take effect before the making of the lease. When the time of computation is future, the commencement in interest cannot of course take effect earlier ; but it may be postponed beyond such period, and made to depend on a collateral event, absolute or contingent.—On the subject touched upon in this note, and the certainty requisite to leases for years, see 4 *Bac. Ab.* tit. Leases (L), *Shep. Touch.* 272.

* The grantee is usually called the lessee, but sometimes he is styled the termor. *Litt. s.* 60. [And if in writing it must be by deed, 7 & 8 *Vict. c.* 76, s. 4.]

See the next
chapter.

creation are those of “demise, lease, and to farm let;” though it may be created by other means, as by bargain and sale, though without enrolment.* An estate for years relates only to the *possession*, and does not affect the *seisin* of the lands. It is what the law calls a *chattel interest*, and is not an estate of freehold, though it be for ten thousand years. Hence, if it be wished that *A. B.* should enjoy certain premises while he lives, it should be inquired into, whether it be the intention of the parties that the estate of *A. B.* should have the properties of a freehold or not. [It is not now a necessary qualification for a member of Parliament that he should be seised of a freehold estate, 1 & 2 Vict. c. 48.] If it be, the estate may be limited to *A. B. and his assigns during his life*; if it be not, it should be limited to *A. B. and his assigns for a certain number of years, if the said A. B. shall so long live*. In the former case the freehold must be passed, [by a deed operating either at common law or by virtue of the Statute of Uses.]

See the next
chapter.

5 Co. 123, b.
Saffyn's case.

As this estate affects only the possession and not the seisin, it may be made to commence *in futuro*, as from Michaelmas day next.† But on

* The stat. 27 *Hen. 8*, c. 6, is confined to those bargains, and sales by which “*an estate of inheritance of freehold*” is intended to pass.—Note by Mr. WATKINS.

† But the time of commencement must not be beyond the period allowed by the rules laid down to prevent perpetuities;

the demise of a term, no estate is vested in the lessee, it only gives him a right of entry; and till he actually enter, he has only an *interesse termini*. He cannot *before* entry receive a *confirmation*, (a) or *release* (b) from the lessor, nor can he surrender (c) his interest, except by a surrender in law, as by accepting another lease incompatible with the existence of the first.*

(a) *Co. Litt.*

296, b.

(b) *Ib.* 270, b.

Touchst. 321.

(c) *Co. Litt.*

383, a.

6 *East*, 86.

for the grant or limitation of a term of years to commence after an indefinite failure of issue, without reference to a subsisting estate tail, or at any other period, or on any other event, which might tend to a perpetuity, would no doubt be held bad. See *Fearne's Cont. Rem.* 6th ed. Appendix, No. 4; *et vide Beard v. Westcott*, 5 *Barn. & Ald.* 801. 1 *Turn. & Rus.* 25.

* An *interesse termini* is merely an executory interest; and the right to enter under it, except when depending on an estate tail, cannot be barred or affected before the time when an entry would be authorized by the lease, grant, or limitation conferring the interest. When that period is arrived, and the actual right to the possession is accrued, it may be barred like any other right of entry: but although it may then be barred, it cannot, until it is executed in possession by the entry of the person entitled under it, be divested so as to prevent it from being transferred to a stranger. 4 *Bac. Ab.* tit. Leases, 195. Although such an interest cannot before entry be enlarged by a release from the lessor, on account of there being merely an interest and no actual estate in the lessee; yet a release to the lessee before entry, from the lessor, of all right that he has in the land, will, in respect of the privity between them, extinguish the rent. *Co. Litt.* 270, b.: and the lessor may for the same reason expressly release the rent to the lessee before entry. *Ib.* 46, b. On the same principles it should seem

Interesse termini.

Doc. & Stud.
27. *Dial.* 1,
ch. 8.

An estate for years is assignable, unless there be an express condition or provision in the lease

that a release to the lessor by the lessee before entry would be held to extinguish his *interesse termini*: and it has been decided that an assignment of it by him to the lessor will have that operation. *Salmon v. Swann*, *Cro. Jac.* 619. [But it will not merge in the freehold subsequently acquired. *Doe v. Walker*, 5 *B. & C.* 111.]

The student will notice that *Mr. Watkins* in the text refers only to leases at the common law, intended to affect the actual possession of the land, to which the observations made by him must be confined, as they are not applicable to terms in remainder, or to terms granted out of a vested remainder, or a reversion, when such terms are vested estates, and when they would entitle the termor to the possession, if the particular estate were immediately to determine; for then, though they do not, during the continuance of the particular estate, give a right to the actual possession, yet they are capable of enlargement by release, of being surrendered, divested, &c. the same as if the termor were in the possession of the land, &c. *Co. Litt.* 270 a, and *Mr. Butler's* note, 227. The observations in the text also do not apply to terms created by a bargain and sale for a year, or for years, by a person seised of the freehold, or to terms created, by way of limitation of use in any conveyance to, or declaration of uses, whether such terms are intended to take immediate effect or to give a future interest; since, in the first instance, those terms vest immediately, and, are under the Statute of Uses, executed so as to become an actual estate without entry, immediately on the execution of the bargain and sale or other conveyance by which they were created; and in the latter instance, they are executed by virtue of the same statute, and confer an actual estate without entry, when the period arrives at which they are intended to take effect in interest, unless a disseisin be

to restrict the power of alienation which the law

previously committed. Such terms therefore, as soon as they are executed, are capable of enlargement in point of estate, of being surrendered, &c. without any entry by the person entitled to them. The common conveyance by lease and release derives its effect from these principles, the lease being a bargain and sale for a year, and under the Statute of Uses giving the bargainee an estate without the necessity of entry by him, and the release operating to enlarge such estate: [but the lease for a year is not now necessary, 7 & 8 Vict. c. 76, s. 2.] A mortgage for a term of years also, when made to operate as a bargain and sale, which it ought always to be, as well as a grant and demise, gives the mortgagee on the same principle an actual estate, immediately on the execution of the deed without entry; but as a grant, it would not, unless there was a particular estate in existence: and as a demise, it would require entry to vest the term as an estate, and before such entry would give only an *interesse termini*. These last examples are connected with the doctrine of uses treated of in a future chapter: but it is important that the student should mark the distinction between terms created by common law assurances, and those created by assurances which take effect under the Statute of Uses. It is apprehended also that terms created by a devise in a will do not require entry to vest them as estates. The devise of a freehold interest confers an actual estate on the devisee before entry. *Co. Litt.* 111 a. On the same grounds the devise of a term must, it is presumed, have the same operation; and if so, terms created by devise may be enlarged by release, surrendered, &c. without any previous entry of the termor being necessary to give effect to such release, surrender, &c.

It may be proper also in this place, to point out the difference between reversionary leases, and leases or more properly grants of the reversion. A lease granted to a

Co. Litt. 46, b.
Plowd. 423.
Co. Litt. 270, b.

gives;* and such assignment may be made even before the lessee enter, as an *interesse termini*

stranger, to commence after the determination of an existing term in the same land, &c. would, now, it is apprehended, be in all cases construed as a reversionary lease, and be held to be a mere *interesse termini* till it was executed in possession, by an entry after the determination of the prior lease. But a grant to a stranger of an immediate term of years in an estate already demised, is a grant of the reversion, vested in point of estate on the execution of the grant, and drawing after it the rents and services of the first lessee. Such grants must be made by deed, and formerly required the attornment of the first lessee to perfect them: but by the stat. 4 *Ann. c.* 16, s. 9, they are made effectual without attornment.

On conditions
 in leases.
 [8 *Bar. & Cress.*
 308.]

Goodright v.
Dauids, Cowp.
 803. *Green's*
case, Cro. Eliz.
 3.

Co. Litt. 301, b.

* On conditions in leases to prevent alienation, or for any other purpose, it is to be observed that, where the condition gives to the reversioner a right of re-entry on breach of the condition, the term after the breach still subsists till determined by his entry; and if after he knows of the breach he accepts of or distrains for rent, accrued due subsequently to the breach, it will be held a dispensation with the forfeiture: he may also by confirmation render the estate of the lessee or his assignee again indefeasible. [*Lord Coke* observes, that there is a diversity in case of a lease for years, where the condition is, that the lease shall cease and be void, and where the condition is, that the lessor shall re-enter; for in the former case the lease is *ipso facto* void by the condition, and no acceptance of the rent after can make it have continuance; but otherwise had the lease been voidable only, as in the latter instance. *Co. Lit.* 215, a. But modern decisions have adopted a more liberal construction of these conditions, in leases, and have decided that, although the words of the condition are that the lease shall be utterly void, yet, that it shall be only voidable, and that the lessor, by acceptance of rent after he is conusant of the breach, may waive the forfeiture.

may be granted over. Or if a lease be made to *two*, one may release to the other before entry.

Doe v. Banks, 4 Bar. & Ald. 401. *Arnsby v. Woodward*, 6 Bar. & Cress. 519, 523, 2 Russ. 174.] With respect to restrictions on alienation, the following points may be noticed. It should seem that a general condition against alienation in a lease to *A.* and his assigns would be void, being repugnant to the grant: but if the lease were to *A.* only, and not to him and his assigns; such a condition would be good. *Hob.* 170. And a condition even in a lease which extends to assigns, that the lessee shall not assign to a particular person, or without previous consent, is good. A condition restraining assignment only, will not prevent an under-lease, *Crusoe v. Bugby*, 3 Wils. 234, & 2 Sir W. Blackst. 766: but the terms of conditions restraining alienation should be attentively considered, in order to judge whether they are confined to assignment alone, or extended also to under-letting. See *Roe v. Harrison*, 2 T. R. 425. *Doe v. Worsley*, 1 Camp. N. P. Ca. 20, and *Roe v. Sales*, 1 Maul. & Sel. 297; and such conditions will bind the personal representatives where they are named, *Roe v. Harrison*, *ubi sup.* A condition, giving a right of re-entry on assignment without consent, does not prevent the lease from passing by, or entitle the lessor to enter on the assignment made by the commissioners of a bankrupt lessee. *Goring v. Warner*, 2 Eq. Ca. Ab. 100, 1 Cooke's Bankrupt Laws, 5th ed. 294; nor does it bind the assignees of the bankrupt, an assignment by whom is no forfeiture. *Doe v. Bevan*, 3 Maul. & Sel. 353. Such a condition is also not broken by an assignment by the sheriff under an execution, unless such execution be fraudulent. *Doe v. Carter*, 8 T. R. 57 and 300. The condition may however be extended to give a right of re-entry, if the lessee commit an act of bankruptcy; and the assignment of the commissioners in such a case will not prevent the entry of

4 Camp. 77.
1 Car. 160.
2 Ino. Wils. 60.

And as a lessee may grant over his *whole term*, so he may make an under-lease of *a part*

Cooper v. Wyat, 5 *Mad.* 490.

Et vide 1 *Swan.* 481.
Doe v. David, 1 *Cr.*, *M. & Ros.* 405.

Flood v. Finlay, 2 *Bull. & Bea.* 9.

Weatherall v. Geering, 12 *Ves.* 505.

See also *Fryett v. Jeffreys*, 1 *Esp.* 393.
Doe v. Ekins, *Ryan & Moo.* 29.
Infra, ch. De-feasance.

the lessor. *Roe v. Galliers*, 2 *T. R.* 133. It seems also that a condition giving a right of re-entry to the lessor, in the event of the lessee becoming insolvent or committing any act whereby the lease may be taken in execution, would be good. *Doe v. Carter*, *ubi sup.* Conditions restraining assignment or under-letting, appear to be entirely abrogated where an assignment takes place by commissioners of bankrupt, or the sheriff under an execution, and the future assignees are not bound by them; and in the former case the lessee himself becoming bankrupt, and coming in afterwards as assignee, is by the stat. 49 *Geo.* 3, *c.* 121, *s.* 19, discharged from a covenant restraining alienation. *Doe v. Smith*, 5 *Taunt.* 795, and *Doe v. Bevan*, *ubi sup.* Such conditions also, so far at least as respects the restraint on alienation, are entirely got rid of, where consent has been once given to an assignment; and they do not in such case extend to the assignee, although the license be confined to authorize assignment to a particular individual only. *Dumpor's Ca.* 4 *Co.* 119, and *Brummel v. Macpherson*, 14 *Ves. J.* 173. [And it should seem that, although the condition for re-entry is gone, the covenant not to assign is still binding on the lessee. 8 *Bar. & Cress.* 486.] But in order that consent may entirely discharge the condition, the consent or license must be given conformably to the terms of the condition; and if it be required to be in writing, a parol license will not prevent the future operation of the condition; and a dispensation with the forfeiture for a breach of the condition does not take away the right of entry for a subsequent breach. *Roe v. Harrison*, *ubi supra.* *Macher v. The Foundling Hospital*, 1 *Ves. & Bea.* 191, and *Doe v. Bliss*, 4 *Taunt.* 735. And as terms of years may be made voidable by a defeasance made at any time after their creation, (*Shep. Touch.* 396, and 398,) that mode may be adopted to restrain future alienation

of his interest. As if he have a term of ten years, he may under-let for five ; and the distinction between an assignment and an under-lease is, where the lessee parts with his *whole* interest, and where *not* ; in the latter case it is an *under-lease*, in the former an *assignment*.*^X In an assignment the operative words are, “ assigned, transferred, and set over ;” and in an under-lease, the same words are used as in the original lease.

Palmer v. Edwards,
1 Doug. 187, n.

*Rent is in reversion.
the reversion.
∴ if there be no re
there is no re of de
∴ if lessee wish to
a re of distress on
lessee the reversion
an under lease &c*

Touchst. 300,
ch. 17.

On the entry of the lessee, he may surrender

without consent, where the original condition is discharged by giving a license to assign ; and on the assignment a defeasance may be made to determine the estate on alienation by the assignee, without the previous consent of the lessor. Such defeasance must be made by deed, and must be with the consent of all those who were parties to the creation of the estate, or, it is presumed, in whom the respective estates and interests of such parties are vested at the time of making the defeasance. *Shep. Touch.* 396.

* [Although the assignment be made in the form of an under-lease, *Thorn v. Woolcombe*, 3 B. & Adol. 586.] But a departure with the whole term, by way of under-lease, would probably be supported as such, when that construction would save a forfeiture ; as in the case where the original lease has a condition restraining assignment, but not under-letting ; and also where the conveyance would be inoperative as an assignment ; as, for instance, where the residue of the original term is three years or less, and the grant of such residue, by way of under-lease, is by parol, in which case, by the second section of the Statute of Frauds (29 Car. 2, c. 3,) it would be good as an under-lease, but, by the third section of that statute, bad as an assignment.—See *Poultney v. Holmes*, 1 Str. 405.

1 Doug. 187, n.
1 East, 502.
1 T. R. 441.
1 Ld. Raym. 99.

2 *Bl. Com.* 326
Co. Litt. 337, b.
 338, on sect.
 636, & *Butl.*
N. (1).

to his lessor, either by a surrender in deed, or in law; [by stat. 7 & 8 Vict. c. 76, s. 4, a surrender in writing must be by deed.] On a surrender in deed, the operative words are, “doth surrender, yield up, and for ever quit claim;” [but it is the general practice, and is always proper to use also words of assignment, in order that the term may pass by the deed, should there be any thing to prevent its taking effect as a surrender,] and to such surrender it is advisable to make the lessor a party, and that he execute the deed, that his assent may be apparent. A surrender in law is, as before observed, the acceptance of another lease incompatible with the first.

Turner v.
Richardson,
 7 *East*, 336.

Touchst. 301.

But if a lessee for twenty years under-lease for ten years, he cannot, by surrendering up his original lease, destroy the under-lease for ten years, as it would be manifestly unjust that he should frustrate his own grants.*

* If, however, the original lease be rendered void, in consequence of a breach of a condition annexed to such lease by the parties to it, or if such lease be defeated by an entry of the lessor on account of the breach of such a condition, the under-lease will also be defeated, and will not prevent the original lessor from recovering the estate; otherwise the original lessee might, by under-letting, deprive his lessor of the benefit of the conditions on which he had demised the estate.

[By the 7 & 8 Vict. c. 76, s. 12, it is provided, that the remedies for the rent and covenants in a lease, shall not be extinguished by the merger of the immediate reversion.]

By the Statute of Frauds (29 Car. 2, c. 3,) no such term (except it does not exceed three years from the making of it, and whereon the rent reserved shall amount to two-thirds at least, of the full improved [annual] value of the thing demised) shall be created, assigned, granted, or surrendered, unless by deed or note in writing, signed by the party, or his agent authorized by writing, or by act or operation of law.

[7 & 8 Vict.
c. 76, s. 4.]

An estate for years may be *devised*, or limited *by way of trust*, to one for life,—and after his decease to another; or to a person *and the heirs of his body*: and the person taking the preceding limitation for years or life cannot defeat the limitation over; but the whole property in the term will vest *absolutely* in the person who takes under that limitation; which, if it were of freehold property, would give an estate tail, without any act done by him; and the limitations over will be effectually defeated.

Harg. n. (5.)
to Co. Litt.
20, a.
Fearn's Cont.
Rem. & Exec.
Dev. 6th ed.
401—421.
2 Roper Leg.
445—479,
3d edit. 1828.

See Doe v.
Lyde, 1 T. R.
596.
Fearn, Cont.
Rem. 6th ed.
461.

But no limitations are allowed of terms of years which would render them unalienable beyond a life or lives in being, and twenty-one years afterwards.*

Ib. 429, 435,
&c.

* What *Mr. Watkins* has stated in the two last paragraphs of the text is applicable to all personal property as well as terms for years, and has in a great measure assimilated personal estate, for all the purposes of family arrangement, to estates of inheritance in real property, since the former may

Lyon v. Mit-
chell, 1 Madd.
467. Britton
v. Twining,
3 Meriv. 176.

now, through the medium of trusts, or by way of executory devise, be limited, or given in succession, nearly to the same extent, where the duration of the estate or interest will admit of it, as the latter. When terms for years, or other personal estate, are bequeathed to a person for life, with a limitation over, the person entitled under the limitation over, takes by way of executory devise, see 1st resolution in *Manning's Ca.*, 8 Co. 95, and *Fearne's Cont. Rem. and Exec. Dev.* 6th ed. 404. In the case of terms for years, when not vested in trustees, the persons entitled for life is at law considered as having the whole term vested in him, *Manning's Ca. ubi sup.*, and *Lampet's Ca.* 10 Co. 46, b.; and during the continuance of the life interest, the person entitled under the limitation over has only a possibility and no actual estate. His interest may, however, be considered as a legal right; since, on the death of the *quasi* tenant for life, it confers of itself a title of entry, without requiring to be then clothed with any further legal property, and the term then vests in him without further act. See *Lampet's Ca. ubi sup.*, *Paramour v. Yardley*, *Plow.* 539, and *Adams v. Pierce*, 3 P. Wms. 12. He [could not, previously to the 7 & 8 Vict. c. 76,] during the life interest, transfer *at law* his interest in remainder to another person; but he might devise it, and his assignment of it would be good in equity. *Fearne's Cont. Rem. and Exec. Dev.* 548; [but it would seem by the 5th section of the above statute, that he may assign his future interest in the lease *at law*, which, if it came within the description of a *chose in action*, he could not do, for by the above section, that is not made assignable *at law*.] He may also release it to the person entitled for life, *Lampet's Ca. ubi sup.*, and his grant of it to such person would, it seems, operate to extinguish it, *Ib.* 7th Quest. And he may during the life interest release to the reversioner, *Johnson v. Trumper*, *Sir W. Jones*, 389, and a surrender to the reversioner would now probably be held to operate as a release. The assignment or grant also of the persons entitled for life, and under the limitation over, to a third person, would pass

[*Wiltshire v. Rabbits*,
3 *Jurist*, 761.]

the whole term absolutely, and be held to operate as the grant or assignment of the former, and a release or confirmation by the latter, *Lampet's Ca.* 10 Co. 49.

The proposition stated by *Mr. Watkins*, in the text, that the whole property in the term will vest absolutely in any person who is made *quasi* tenant in tail of such term, is to be understood with the qualification, that there is no condition attached to the limitation to determine it within the limits mentioned by him in the last paragraph; for a limitation over in the event of the *quasi* tenant in tail, (being a child of some person in being at the time of the settlement,) dying under the age of twenty-one years without leaving issue at his decease, would be good. And a proviso to that effect is now always introduced in well drawn settlements, comprising leaseholds, and in powers of sale and exchange, where they include those estates in their object. Without such a provision the leasehold estates would be withdrawn from the settlement as soon as any *quasi* tenant in tail became entitled to them, for such person could (a) bequeath them, after the age of fourteen years if a male, and after the age of twelve years if a female; and without any bequest they would on the death of the *quasi* tenant in tail vest absolutely in his or her personal representatives; but, by the provision, they are rendered inalienable, and follow the limitations of the settlement, until some person who is *quasi* tenant in tail attains the age of twenty-one years, when such person would also have the power of barring an entail in freehold property.

(a) Previously
to the 1 Vict
c. 26.

From this chapter the student will have observed that an estate for years confers a title to the possession of the land, as distinguished from and without disturbing or interfering with the seisin or freehold. The estate, when intended immediately to take effect in possession, or when the period arrives at which it is intended to have such effect, entitles the termor, during the subsistence of the term, to the possession of the land, against the freeholder and all persons claiming under him subsequently to the creation of the

Doe v. Finch,
4 Bar. & Adol.
283, 300.

term; and as we have already stated it cannot, when its commencement is confined within proper limits, be barred while it remains an *interesse termini*, except in the instances that have been mentioned. But this possession of the termor is in law considered as the possession of the freeholder: and though the former should, from the nature and duration of his estate, be entitled to the whole profits of the land, for one thousand or any other number of years, without payment of any rent to the freeholder, yet the title and seisin of the latter still subsists, with the privileges which the law has annexed to an estate of freehold, but subject to the qualifications required by law, where any beneficial interest must be connected with such estate, for the exercise of any privilege by the freeholder as in the case of voting for members of Parliament, &c. From these qualities arise the practical use and importance of terms of years in the modern system of conveyancing. They were originally intended merely for the benefit of the occupant, by giving him an interest not depending upon the will of the freeholder, but at the same time not interfering with the relation of the latter as tenant to the lord. And the interest being then created for short periods only, and for the sole purpose of husbandry, an occupation which, when the feudal system was in full vigour, was not thought sufficiently honourable to confer any dignity on those who followed it, the law then afforded little protection to such a species of property. When however the growth of commerce led men to consider property, more with reference to its beneficial value, than the dignity arising from the nature of the tenure, estates for years soon received the same protection as other estates. It was then discovered that, besides answering the purposes of short leases, they might from the peculiar nature of them, when extended in duration, be applied with advantage, for inducing persons to improve estates by building or otherwise, and also in mortgage transactions, and in the settlement and complicated arrangement of real property, which became necessary in the advancing state of civilization. Thus the

creation of estates for long terms was introduced; and through them a facility was obtained for charging settled estates and raising sums of money for any particular purpose, without disturbing the successive limitations of the freehold and inheritance; which could not, in many cases, be otherwise accomplished, except by the means of vesting the legal estate in trustees. The creation of terms of years, in wills and settlements, for raising money for payment of debts, or any charge affecting the estate, for securing rent charges and jointures, for raising portions for younger children, or daughters, or any sum of money for the benefit of a person having no estate, or only a particular estate, in the property, are instances of the advantage with which they are applied in this respect.

When long terms of years thus became in frequent use, an important consequence, beyond the immediate object of their creation, that of making them in certain cases attendant upon the freehold and inheritance of the estates in which they were raised, soon attached to them. It may be useful to the student to attempt an elucidation of the principles upon which this important branch of Conveyancing is founded. It is peculiar to the system of real property established in this country, as it can only arise where there is a recognised distinction between the legal and equitable ownership of estates. If Courts of law took cognizance of equitable interests, there would be no necessity for preserving a distinction between such interests, and the legal estate; and, in fact, that distinction would then never have arisen, as the person beneficially entitled would have been regarded legally as the owner of the estate; and so soon as the object for which any particular estate was created or conveyance made, was satisfied, or had failed, the estate or conveyance would have been held to have been at an end. When therefore, in mortgages, the money was paid, either at the time agreed upon or afterwards, or when the sum to be raised under the trusts of any term of years was discharged, or it became unnecessary to raise it, by the failure of the object, the estate created for securing the

Terms of years attendant upon the inheritance, *Butler's Notes to Co. Litt.* 290, b. n. 249, s. 13.
1 *Sanders on Uses & Trusts*, 3d ed. 228.
1 *Cruise's Dig.* tit. xii. c. 3. ed. 4.
Sugd. Vend. & Purch. ch. 9, s. 2, 9th ed. 453. *Willoughby v. Willoughby*, 1 T. R. 763. Judgment of Lord Hardwicke in *Hill v. Adams*, *Butler's Notes to Co. Litt.* 208. a. n. 105, and *Maunderell v. Maunderell*, 7 Ves. J. 567, & 10 *Ib.* 246.

Doe v. Sy-
bourne, 7 T. R.
2.

Doe v. Scott,
11 *East*, 478.

money would have been considered as determined. The division however of interests into legal and equitable, which the law of England recognises, and the separation in a great measure of the tribunals which take cognizance of such interests, prevented this consequence from taking place as a general rule. The Courts of law, confining themselves to legal interests, and refusing to notice the mere equitable interest, consider the estate created as still subsisting, unless a surrender or conveyance of it be made. Or at most they, in some instances, after a length of time, presume a surrender or conveyance to have been made at the period when, according to the equitable relation of the parties it ought to have been done, if there be no circumstances to rebut such presumption. But they never raise such presumption against facts of a contrary nature. On these principles, when a term of years is created for any purpose, such term is at law considered as a term in gross, and severed from the inheritance, even after the purposes for which it was created are completely satisfied, or have failed, unless a condition was annexed to it on the creation, that it should determine on the satisfaction or failure of such purposes, and except in the cases where the circumstances afford ground for presuming the surrender of it. The Courts of law will not enter into the equity of any parties claiming against the termor, but consider him in right of his estate as the person legally entitled to possession, leaving the equitable interests, where they exist, to the protection of the Courts of equity.

It may be proper, perhaps, to inform the student, that an attempt was at one time made to break through these principles in some measure ; and the Courts of law began to allow persons claiming a title to the freehold, to try their right in ejectment, notwithstanding the existence of a prior term, where such term was held in trust for the freeholder, or where the party claiming the freehold submitted to claim subject to the term. This, as the action of ejectment is merely possessory, was in fact admitting the recognition of equitable interests in Courts of law. See the cases of *Lade*

v. *Holford*, *Buller's Law of Ni. Pr.* ed. 1775, p. 110. *Goodright* v. *Sales*, 2 *Wils.* 329, and *Doe* v. *Pegge*, 1 *T. R.* 758, n. (a). But these cases have since been overruled. See *Doe* v. *Staple*, 2 *T. R.* 696, where Lord Kenyon put the case of *Lade* v. *Holford*, on the ground only of a presumed surrender of the term, when of course it could no longer give a title to the possession. See also *Goodtitle* v. *Jones*, 7 *T. R.* 43. *Doe* v. *Wharton* and *Dixon*, 8 *T. R.* 2, and *Roe* v. *Reade*, *Ib.* 122. In the last case, Lord Kenyon said, that if it appears in a special verdict or case that the legal estate is outstanding, the person not clothed with the legal estate could not recover in a Court of law; and that he could not in that respect distinguish between the case of an ejectment brought by a trustee against his *cestui que trust*, and one brought by any other person. And the doctrine established by these latter cases has since been invariably followed. See *Doe* v. *Wroot*, 5 *East*, 132, and *Doe* v. *Scott*, 11 *East*, 478. The Courts of law have thus been brought back strictly to the recognition of legal interests only; when, therefore, in a possessory action, a term is shewn to be in existence, which has a preference to the title of the claimant, the Courts of law will not enter upon the discussion of such title.

2 *Barn.* & *Ald.*
723. 2 *Brod.* &
Bing. 17.

But as in equity the freeholder, after the purposes for which the term was created were satisfied or had failed, was clearly entitled to have a surrender of the estate, those Courts have always regarded the termor, after such period, as a trustee only for the freeholder. And it soon became necessary to settle how this beneficial interest of the freeholder in the term was to be considered. The Courts of equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interest in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest only, and is transmissible to the personal representatives, in the same manner as the legal estate. In the case, however, in question, it was evident that a distinction must be made: it was never the wish of the owner of the fee to create a distinct chattel

interest, first for a particular object, and afterwards for the benefit of himself and his personal representatives, to the exclusion of his heirs; his intention was simply to raise the term for a particular purpose. From a regard, therefore, to this intention, and in order to preserve the higher and more important interest which the freeholder had as owner of the fee, which would have been materially infringed upon by raising an equitable interest in him of a mere chattel nature for a long duration, the Courts of equity held, that this beneficial interest of the freeholder in a term whose purposes had been answered, should be subordinate to and merely attendant upon the higher estate of which he was seised or possessed. In fact, though the term is, as we have seen, kept distinct at law, yet in equity the beneficial interest is considered as completely consolidated with the freehold and inheritance, vested in the person entitled as *cestui que trust*; and therefore it follows the fee, in all the various modifications and charges to which it may be subjected by the acts of law or of the owner. The consequence is that this equitable interest in the term is not treated as a chattel: it will not be forfeited by the felony of the owner of the fee; *Attorney-General v. Sandys*, 3 *Cha. Rep.* 19. *Hard.* 488; it was [not previously to the late statute 3 & 4 *Will.* 4, c. 104,] liable to his simple contract debts, *Tiffin v. Tiffin*, 1 *Vern.* 1: but was together with the fee, real assets. It does not as against the heirs, or devisees, of the *cestui que trust*, or the assignees, in the case of bankruptcy, prevent the attachment of the title of dower, or curtesy, of the wife, or husband, of the person entitled as *cestui que trust*, *Wray v. Williams*, *Prec. in Chan.* 151, and 1 *P. Wms.* 137; *Lord Dudley v. Dudley*, *Prec. in Chan.* 241; *Snell v. Clay*, 2 *Vern.* 324; and see 2 *P. Wms.* 707; and *Squire v. Compton*, 9 *Vin. Ab.* 227, pl. 60; and if the inheritance eschêat, the term will go with it, *Thraxton v. Attorney-General*, 1 *Vern.* 340.

When the Courts of equity had thus settled the nature of the beneficial interest in terms attendant upon the inheritance,

the advantage of preserving them, and assigning them from time to time, with an express declaration that they should be so attendant, became apparent. For the actual assignment and recognition of them, as subsisting, prevents the legal presumption of their having been surrendered; and the freeholder, through the medium of his trustee of the term, can in many instances carry back his title to the possession for a much longer period than he can shew a clear title to the inheritance. And should his latter title be found defective, or subject to any charge, yet his trustee, and consequently he, as *cestui que trust*, will, in right of the term, be legally entitled to the possession during its continuance, to the exclusion of all persons claiming any right to, or interest in, the land, in respect of any disposition, or charge, made subsequently to the creation of the term. This is the advantage which a purchaser or incumbrancer secures, by procuring an assignment of a term to a trustee in trust for himself.—He protects his estate from being defeated or injured, by prior titles and charges of which he is unacquainted, however valid they may be, see *Goodtitle v. Jones*, 7 *T. R.* 43, or by any subsequent disposition by the vendor or owner. By neglecting to take such assignment, he leaves himself exposed to the risk of some other person, whose title, or interest, may even be acquired subsequently to his own, getting the benefit of the term, and using it to his detriment, see *Goodtitle v. Morgan*, 1 *T. R.* 755. Further, the Courts of equity consider all persons acquiring any interest in an estate, who are clear of notice of any other title (which point will be hereafter considered), as having an equal right to gain the benefit of an outstanding term for the protection of their interests, if they can obtain it: and every assignment diverts the term from its former channel, where it was attendant, perhaps, on an inheritance vested in some other person whose title could be enforced against the person in possession, or on the estates and interests of several persons according to the priority of their respective titles and charges; and turns the whole benefit of it in favour only of

a particular individual, and the inheritance he has acquired, whose title might, perhaps, independently of the term, be found to be the weakest, or altogether bad. Thus a person who has a defective title to the inheritance may, by means of a term, secure his possession of the estate ; and this, as the term is in most cases of considerable length, is virtually securing the full benefit of the inheritance ; for the Courts of equity will not, where the person who has a defective title to the inheritance, and has also obtained the advantage of an attendant term, and is not affected by notice of the title, or charge, which, but for the term, would prevail against him, deprive such person of the advantage he has acquired, or abridge his estate or interest, to the mere beneficial interest in the term. On the contrary, they consider the term as attendant only on the freehold and inheritance which he has acquired, notwithstanding the existence in any other person of a better right or title to the inheritance, or to any charge upon, or particular estate or interest out of it. But the only persons that equity will allow to protect themselves by the assignment of an outstanding term, are purchasers for a valuable consideration, (in which description are included persons claiming under settlements made before, or in pursuance of articles entered into previously to marriage, and mortgagees, annuitants, &c.) and without notice, at the time of their purchase, of the intermediate estate, or incumbrance, against which they would protect themselves. Between such persons and those claiming against them, the equity is equal ; that is, neither of them has any ground of preference to claim the protection or interference of a Court of equity in his favour, against the legal title of the other of them ; and whenever that is the case, the parties are left to their legal title, and whoever has the best will prevail. Two exceptions, however, exist to the rule respecting notice ; *first*, in the case of Dower, against which a purchaser even *with* notice is allowed to protect himself, where he takes an actual assignment of a term, *Radnor v. Vandebendy, Show. Ca. in Par. 69, and Prec. in Chan. 65 ; Swannock v. Lyford, Amb. 6 ;*

Butler's notes to *Co. Litt.* 208, a. n. 105 ; and *Maundrell v. Maundrell*, *ubi supra* ; *Mole v. Smith*, 1 *Jacob & Walk.* 665 ; and *secondly*, in the case of specialty debts to the crown, against which a term will not protect a purchaser even *without* notice of them, *The King v. Smith*, *Sugd. Vend. & Purch.* App. No. xvii. It is further to be observed on the point of notice, that it is not necessary that a person should be unaffected with notice, when he procures the assignment of a term, if he were clear of notice at the time of his purchase or mortgage, or other charge : for in such case equity allows him to avail himself of any protection he can acquire against the defect of title, or charge, which he has subsequently discovered ; and an outstanding term, or legal estate, is considered as *tabula in naufragio*, of which the first who possesses himself is allowed the full benefit.

As a term of years, which is attendant upon the inheritance, is thus considered part of it, whilst one which is in gross, both at law and in equity, is part of the personal estate only of the owner, it may be proper, and in practice is sometimes important, to ascertain in what instances a term will become attendant. This may be either by construction of law, or more correctly of equity, or by express declaration. When the same person is beneficially entitled both to the term and the fee, whether his interest in the former be equitable, and in the latter legal, or *vice versâ*, so that a merger would take place, if the legal interests in both were united in him, or if such merger would not take place, on account of intervening legal estates, yet if the same person be also beneficially entitled to such intermediate estates, or if they were created by such person, or raised only for securing mortgagees, or other charges, the term is, in such cases, attendant upon the inheritance by necessary implication of law. Whether a term can be made attendant by express declaration, where it would not be so without, is a point on which there is a considerable difference of opinion, see *Scott v. Fenhouillet*, 1 *Bro. C. C.* 69, *Sanders on Uses and Trusts*, 3d ed. 230, and *Sugd. Vend. & Purch.* 9th ed. 523, and an

opinion of *Mr. Fearn*, in 2 *Col. Jur.* 297. It should seem, however, to be the better opinion, that where a person is entitled to the beneficial enjoyment of an estate in right of a term only, and such person, although owner of the inheritance, has no title, as such owner, to claim a preference to the acquisition of the term, and there is also an actual beneficial interest in the estate immediately reversionary to the term in another person, over which the person, entitled to the inheritance, has not, in right of the inheritance any controul; in such case, although the person entitled to the term, and the possession in right of it, may also have the inheritance, yet he cannot even by express declaration make the term attendant upon the inheritance. For if he could, it would be taking advantage of a rule of equity, to alter the nature of property, and to convert a chattel interest into a freehold one. From what has been said, the student will observe that where a termor purchases the freehold and inheritance, and takes a conveyance of the fee in the name of a trustee, the term in himself will, by construction of law, be attendant upon his equitable fee simple; and it is the practice to require the assignment of such terms as being attendant. There was, however, [before the statute 3 & 4 *Will.* 4, c. 104, which renders real estate assets for the payment of simple contract as well as specialty debts,] this difference between them and other attendant terms, that they were assets in the personal representatives of the owner of the estate, for the payment of his simple contract debts, see *Dowse v. Percival*, 1 *Vern.* 104, and *Thruxton v. Attorney-General*, *Ib.* 341. This followed as a legal consequence, and there was no ground for equity to interfere against the creditors: in other respects they are assimilated to attendant terms vested in trustees.

The student will, it is hoped, from the preceding observations, be enabled to trace the general outlines of the doctrine of attendant terms, and the principles which govern it. The importance of that doctrine in practice, and the difficulty of explaining it concisely in a familiar manner, must be the apology for the length to which the observations have ex-

tended. Too much pains cannot be bestowed in order to acquire a complete knowledge of the subject ; and the student should pursue it in the several works and cases referred to in the margin, and in the cases which have been cited in the course of these remarks. An attentive perusal of them will more fully convince him of the utility of assigning terms as a protection, and the danger of leaving them outstanding. Of the former, the case of *Goodtitle v. Jones*, 7 *T. R.* 43, before cited, is as strong an instance as can well arise ; and *Goodtitle v. Morgan*, 1 *Ib.* 755, which has been also already referred to, is a striking example of the latter.

In practice, it is now the general rule for a purchaser, or mortgagee, to require an assignment, or surrender, of all terms which have been previously assigned to attend ; and an assignment or surrender of any outstanding terms, even where they have never been so assigned, can rarely be safely dispensed with ; for the doctrine of a presumed surrender is not to be relied on, and could never be maintained against an actual assignment procured by another person. It was formerly very usual to leave terms, which had been already assigned to attend, in the old trustees, and to rest satisfied with a general declaration, in the conveyance of the estate, that they should be held in trust for the purchaser, or mortgagee. This practice is not to be recommended, and is now seldom adopted. In *Maundrell v. Maundrell*, *ubi sup.*, there was a general declaration of that nature ; but it was decided that there must be an actual assignment to a trustee for the purchaser, to protect against a title of dower ; and the principle of that decision seems equally applicable to the case of all charges and incumbrances. When there is a term sufficiently old, which can be shewn clearly to include the estate, and of which every step of the title can be easily proved, it is unnecessary to assign any others ; and, indeed, more advisable to surrender them, to prevent the expense of preserving and procuring a person to assign them at a future period. But sometimes it is necessary to assign more than one term in the same estate, as it may be uncertain of which the owner could

Doe v. Hilder,
2 *Barn. & Ald.*
782. *Emery v.*
Grocock,
6 *Madd.* 54.
Sugd. V. & P.
510, 9th ed.
1 *Pow. Mort.*
503, 5th ed.
Gray v. Boul.
2 *Bro. & Bing.*
671. [*Doe v.*
Plowman,
2 *Bar. & Adol.*
573.]

avail himself. Now, it is a rule of law, when two estates which are immediately reversionary to each other, meet in the same person in one right, that the one which gives the title to the possession, except it is an estate tail, will, if it be less in quantity than the one in reversion, merge and become extinct in the latter. A term of years will, therefore, merge in an estate of freehold, or higher estate; and it has been further decided, that one term will merge in another which is immediately reversionary to it, *Hughes v. Robotham, Cro. Eliz.* 302; *Stephens v. Bridges*, 6 *Madd.* 66, Reg. Lib. B. 1821, p. 1687. This merger will take place, although the term in reversion be for a less duration in point of time than the one which is entitled to the possession; for it does not depend upon one term being longer than the other, but on the relation which the two termors bear to each other, while the estates are kept distinct. In such case the person, who has the term which was first created, is, in right of it, entitled to the possession; and the person who has the term in reversion is entitled to the rents and services, where any are reserved, of the first termor, as holding a grant of the reversion, to which those rents and services were incident. The first termor is, therefore, in fact, legally tenant to the other, and this tenancy equally subsists where there is not any rent payable. The consequence is, that the first termor can surrender to the second; and on such surrender his estate becomes extinguished in the portion of the reversion which is vested in the latter, whose estate then becomes an estate in possession. And where both the estates meet otherwise in the same person in one right, the same effect follows by operation of law; and the term first created will merge in the reversionary one, in right of which alone the person will become entitled to the possession. To prevent this, which might be injurious to a title, in the case where a number of terms in the same estate are to be assigned, it is the practice to assign them alternately to two trustees: one trustee takes the 1st, 3d, 5th, &c., according to the priority of creation; and the other trustee, the 2d, 4th, 6th, &c. Thus

[6 *Cru. Dig.*
tit. *Merger*.
p 475. Ed. 4.]

none of the terms vested in either trustee are immediately reversionary to any of the others vested in the same trustee, there being an intermediate term to each, vested in the other trustee, which, so long as all the terms are subsisting, prevents the merger of any of them; and by this plan two trustees are sufficient for any number of terms.

A plan has been proposed for rendering titles under attendant terms more simple, that the trustees of the several terms should make underleases, to the full extent of their respective terms, except a small reversion on each to one person, in trust for the purchaser, or other person, requiring the protection of the terms, and to attend the inheritance; leaving the reversion on each underlease outstanding in the original trustees, which would prevent the merger of the several derivative terms. This plan, if a purchaser would not require the assignment of the original terms, which are made merely reversionary on the underleases, secures, it is supposed, the benefit of all of them, at the expense only of preserving one trustee. The objection to it, which is admitted, is that a purchaser might require the assignment of the original terms; and it is submitted that he has a right to do so, and could not be advised to waive such right, whilst he is exposed to have it asserted against himself on a future occasion, when his expense would probably be considerably increased, by having left them outstanding. If, therefore, the original terms are to be assigned, no advantage can arise from the adoption of the plan. Another mode has been suggested, for simplifying titles under terms, on the plan of an underlease; which is, that one underlease should be made, derived out of all the terms, and the term so created be vested in a trustee to attend the inheritance; which new term, it is stated, will operate on each of the terms, giving the benefit of each of them, and be a lease, from the person who for the time being can confer the right to the possession, and a confirmation from the other lessors; and then that the several residues of the original terms should be assigned to another trustee; or, which is stated to be preferable, and equally safe, should

2 *Preston's
Treat on Con-
vey.* 127.

3 *Prest. Treat.
on Convey.* 205.

be surrendered. If the original terms are to be assigned, then, as there must be two trustees, we see no advantage to be derived from this plan, over that of assigning the original terms alternately, in the manner we have first mentioned : and the only benefit that appears, is that of having one trustee instead of two, by surrendering the original terms. The objections, that we think the plan open to, apply equally, whether the original terms are assigned, or surrendered. First, we conceive the proposition questionable, that a term, created by way of underlease, secures, in all cases, to the lessee, the benefit of all the terms out of which it is derived. It is true, that a term granted by a tenant for life, and the reversioner in fee simple, will give the termor the full benefit of his term ; first, out of the estate for life, and afterwards, out of the reversion. In this case, however, the derivative estate is less in quantity than the estates out of which it is created ; and there is a reversion left both in the tenant for life, and reversioner in fee. But in an underlease granted by a termor, the derivative estate is equal in quantity, or degree of estate, with the estate out of which it is created ; and a reversion can be preserved, only by making the derivative estate for a period less in duration than the residue of the original term : for if the whole time of that term be parted with, though by way of underlease according to the form of the deed, yet it is in construction of law an assignment of the original term, and not an underlease derived out of it. It is on this principle we think the proposition above-mentioned doubtful in its application to the case of attendant terms. Those terms are usually concurrent with each other, and operate after the first, as successive grants of the reversion. Now, to illustrate the point in question, we will suppose that several terms are outstanding, of the description we have mentioned, differing in duration, but of which the last, in point of creation, extends beyond all the others, by any given portion of time ; and all the termors join in an underlease to one person, for a term which shall embrace the whole period of the residue of all the terms, except the last, of which a small

Scott v. Fen-
houillet, 1 Bro.
C. C. 68.

reversion is left. In this case, as the underlease includes the whole time of all the terms, except the last, it will, it is presumed, operate as an assignment of all those terms, and consequently produce a merger of such of them as are immediately reversionary to each other, in the same manner as if they had been assigned to one trustee. Further, so far as the underlease takes effect out of the term which was created last, it will, it is conceived, be a grant out of such term; and the term created by such grant, being immediately reversionary to all the others, which had been assigned by the operation of the underlease, will merge those terms; so that, in fact, the underlease will operate solely out of the last term, instead of giving the benefit of the former ones; and has nearly the same effect as if all the terms had been assigned to one trustee. For if all the termors, except the last, assigned their several terms to one person, and then the last termor made a grant out of his term to the assignee, this, if the terms will merge at all in each other, would merge all the prior terms; and the operation of the underlease, as it has the same effect, must, on the same principle, produce the same consequence. When the term of which the residue is the longest, is not the last in point of creation; still the same consequences will, it is presumed, partially follow, if the underlease comprises any portion of the time by which such term exceeds the others, as it will be an assignment of all the terms of which it includes the whole period of the residue, and a grant out of the one of which any reversion is left. Another objection to which we think the plan of underleases is exposed, which applies generally to every plan of that nature, is, that an underlease, which takes effect, strictly as a lease, out of the term entitled to the possession, can operate only as a demise at common law, requiring the actual entry of the lessee to vest it as an estate, and before such entry conferring only an *interesse termini*; and we think it doubtful how far the entry of the freeholder, the *cestui que trust*, would, in a Court of law, be considered as the entry of his trustee. having only an *interesse termini*.

We therefore think, on the whole, that when several terms require to be assigned, the first mode we have mentioned, of assigning them alternately to two trustees, is the safest to be followed.

There are some incidents to an estate for years which have not been noticed. The lessee, where not restrained by covenants, or a reservation out of the demise, to the contrary, which is now usually the case, is entitled to *estovers*, i. e. to timber and wood, for fuel, and for the repairs of his dwelling, hedges, &c., and agricultural implements. And where the term is limited to determine on the happening of a collateral event, the lessee, or his personal representatives, are, when it so determines, entitled to emblements. With respect to waste, and forfeiture, the same doctrine is generally applicable to a tenant for years, as to a tenant for life; and for information on those points we refer to the Chapter "Estate for Life."

*Davis v. Duke
of Marlboro,
2 Swan. 144.*

CHAP. III.

OF AN ESTATE OF FREEHOLD.

ESTATES *at will* and *for years* are considered by the law as only chattel interests. An estate for *one's own life*, or the *life of another person*, or any *greater* estate, is deemed an estate of freehold. In the tenant of the *latter* estate the feudal possession or seisin is vested; and the tenants of the *former* are regarded as only the bailiffs or farmers of their respective lessors.*

2 *Black. Com.*
104, &c.
Sulliv. Lect. vi.
1 *Burr.* 107, &c.
Butl n (1) to
Co. Litt. 266, b.

* This position hardly applies to the nature of chattel interests in the present day.—It is drawn from the feudal law, under which estates for years were so little regarded, that if the tenant of the freehold permitted the freehold to be recovered in a feigned action, it operated as a good bar to all terms of years derived out of it, by reason that the recoveror came in by a title paramount to that of the lessor; nor could the termor for years falsify the recovery. This evil was remedied by the statutes of *Gloucester*, 6 *Edw.* 1, c. 11, and the 21 *Hen.* 8, c. 15, and the estate of termor for years is now as well protected by the law as that of the freeholder. The law, however, still considers the possession of the termor, as the possession of the freeholder, as has been already explained in the note on terms for years, *ante*, page 46, and, therefore, if the ancestor die, leaving a chattel lease

Hence *livery of seisin** was given on the creation of an estate of freehold, though it could not be given on the creation of an estate at will or for years† only, as the person intended to hold at will, or for years, was not to be put into the *seisin*; for if livery *had been* given, a *freehold*, of necessity,‡ would have passed at common law.§ The tenant for life, or the immediate

outstanding, the entry of the heir is not necessary, for he is in the actual seisin, before entry or receipt of rent. And if, in the like case, there were issue of different venters, and after the death of the father, the eldest son died without entry, there would, nevertheless, [before the stat. 3 & 4 *Will.* 4, c. 106,] be a sufficient seisin in him to constitute what the law called a *possessio fratris*, and to prevent the issue of the half blood from succeeding to the estate.

* The necessity of an *actual* livery is now frequently obviated by conveyances under the Statute of Uses. See Book II., c. 11, 12, and 13.—Note by Mr. WATKINS.

† But if the inheritance be by deed of feoffment, limited to one for years, with remainder over for life, in tail, or in fee, in such case the livery of seisin was, *ex necessitate rei*, made to the lessee for years. But the lessee must have taken care not to enter into possession before livery made; for afterwards the livery could not be made to him on the principle, says Lord Coke, “*quod semel meum est, amplius meum esse non potest.*”

‡ But livery of seisin made “*secundum formam chartæ*” restrained its operation to the estate contained in the deed. “Thus,” says Lord Coke, “If a man make a lease for years by deed, and deliver seisin according to the form and effect of the deed, yet the lessee hath but an estate for years, and the livery is void.”

§ But since the Statute of Frauds, a freehold cannot pass without writing.—Note by Mr. WATKINS.

tenant of the freehold, is to answer to the *præcipe* of strangers,* and to render to the lord the returns of the feud; and hence it is, that an estate of freehold was not suffered to commence *in futuro*,† as there must have been such an immediate tenant in actual existence.‡

* And, therefore, he has a right to the possession of the title deeds, in order to enable him to defend his claim.—
Note by Mr. WATKINS.

† But at the present day a freehold may be limited in corporeal hereditaments, *in futuro*, by way of executory devise or future use, as will be explained hereafter; and in the mean time, the freehold will remain in the grantor, or the heir of the devisor, as the case may be. And with respect to incorporeal hereditaments granted *de novo*, such as rents, &c., a freehold may be limited to commence *in futuro*.

It may be further remarked, that an estate of freehold is, in the eye of the law, always considered as of greater interest than an estate for years, or chattel interest, and consequently, if a term for ten thousand years, and an estate for life, unite in one and the same person, the term will merge in the freehold, unless there be an intervening estate to prevent the union of interests; and note, that on a devise of lands, the freehold is in the devisee before entry, and he may enter without the assent of the heir of the devisor, and maintain ejectment against him.

‡ In this chapter *Mr. Watkins* has very briefly treated of the Estate of Freehold. We shall not apologize to our readers for the following remarks. The explanation rendered by *Mr. Watkins* (after stating the duration), of the nature of the estate is, that in the tenant of this estate the feudal possession or seisin is vested; and he must answer to the *præcipe* of strangers, and render to the lord the returns of the feud: an explanation strictly drawn from the prin-

Webb v. Ly-
mington,
1 *Eden*, 8.
1 *Dick*. 298.
Roberts v.
Roberts, 1
Mudd, ch. 230.
Noel v. Ward,
1 *Mudd. Rep.*
322.

Co. Litt. 46, a.

Co. Litt. 111, a.

ciples of the feudal law. It is probably true, that under that law the freehold always denoted an estate *in possession*, in like manner as the term "freeholder" still does; for the word freehold appears originally to have comprised the whole fee, whatsoever its extent. And the freeholder represented the whole fee, insomuch that prior to the 32 *Hen. 8, c. 31*, if he permitted the freehold to be recovered against him in a fraudulent or covenous action, the remaindermen were utterly barred and without remedy. But, we apprehend, it is long since the term "Estate of Freehold" implied, or required, the actual possession of the land, although the learned author of the Commentaries, in explaining the meaning of the word freehold, Vol. II. p. 104, after citing *Britton*, cap. 32, and the *Doctor and Student*, B. 2, d. 22, says, "Such an estate, therefore, *and no other*, as requires actual possession of the land, is, legally speaking, freehold." An estate of freehold, we submit, may, according to our modern ideas, be in possession, remainder, or reversion. For, as remarked by

Lord Mansfield, instead of (as formerly) signifying the whole fee, it now denotes the *duration* of a man's estate or interest in the land; that is, instead of being applied, as formerly, to express the nature of the tenure, it is now applied to signify the duration or extent of the interest which the individual takes in the inheritance of the land. The inheritance may be split into numberless estates of freehold, instead of the freehold signifying, as formerly, the whole fee. In fact, as observed by *Mr. Butler*, *Co. Litt.* 266, b. note 1, the Estate of Freehold now implies the reverse of its former signification, for (standing alone, and without further explanation) it denotes that the estate or interest in the land is not of inheritance, but an estate for life only. The freehold, or *liberum tenementum* of the feudal law, is hardly understood in modern times. In the learning of disseisins, in cases of writs of *præcipe quod reddat*, and in certain instances of release of right to the land, we still look, it is true, to the actual freeholder: but, for the great purposes of the feudal law, the consequences resulting from the feudal

1 *Burr.* 108.

seisin, or possession, are at an end. And *Lord Mansfield* ^{1 Burr. 108.} goes so far as to say, "that the statutes passed for the prevention of subinfeudations, and for the removal of restraints on alienation, together with the frequent releases of feudal services, the Statutes of Uses and Wills, and the total abolition of all military tenures, have left us little but the name of freehold, without any precise knowledge of the thing originally intended by that sound." It is not our intent to enter into an explanation of the feudal system, nor of the means alluded to by *Lord Mansfield*, whereby that system was eventually destroyed. For this purpose, we must refer the student to the several excellent treatises on the subject.

A freehold interest, we conceive, may imply considerably more than a mere estate of freehold. It may, as opposed to copyhold, or chattel interests, comprise the whole fee, and be expressive of the whole estate created. But we wish to impress on the mind of the student, that an estate of freehold is not now necessarily an estate in possession, and that, correctly speaking, standing (as we have said) alone, and unassisted by other expressions, it denotes that the estate or interest in question is not of inheritance, but for life only; and that where a greater estate is intended to be expressed, it is now more accurate to say "freehold and inheritance."

An estate of freehold, therefore, may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life or for some uncertain interest created by will, or by some mode of conveyance capable of transferring an estate of freehold, which may last the life of the devisee, or grantee, or of some other person." It may, however, be necessary to remind the student, there are certain interests in land, which, although of uncertain duration, and therefore in that respect participating of the nature of freehold are nevertheless chattels. These are interests created by the statute law; and are securities for the payment of debts, namely, estates by statute merchant, statute staple, and by *elegit*, *Co. Litt.* 42 a, the possessors of which are said to hold their lands

Carter v. Barnardiston, 1
P. Wms. 509.
Hitchins v.
Hitchins,
 2 *Vern.* 404.
Co. Litt. 42, b.
Dyer, 135.

“ *as freehold* ;” but whose interests are really chattel. There is also another exception to the rule, in the case of an indefinite devise of lands to executors or trustees for and until payment of debts, which is also a chattel interest [in wills not within the operation of the statute 1 *Vict. c.* 26, *s.* 31] ; and a grant of a presentation to an advowson is also, it seems, a chattel interest.

A freehold interest may be had in offices relating to land, or exerciseable within particular districts ; and these are within the Statute *De Donis*, and may be entailed. *Lord Coke* mentions as instances, the Marshal of England, one of the Chamberlains of the Exchequer, and offices of Forestership. See also 3 *Cruise's Digest*, 4th ed. Title *Offices*, p. 98.

Haverhill v.
Hare, *Cro. Jac.*
 510.

An entry on land under powers of distress and entry, on a grant of an annuity in fee by a conveyance, operating under the Statute of Uses, also gives a freehold interest, *viz.* a conditional inheritance determinable on payment of the rent ; and until entry made, the right of entry is in the nature of a contingent or future use to arise on nonpayment of the rent, and will pass with a grant of the rent.

CHAP. IV.

OF AN ESTATE *POUR AUTRE VIE*.

AN estate *pour autre vie* is an estate of *freehold*, though it is the lowest or least estate of freehold which the law acknowledges.* An estate for the life of *another* is not so great as an estate for *one's OWN LIFE*.† If *A.* have an estate for his own life, with remainder to *B.* for the life of *B.*, *B.* is capable of taking a surrender from *A.*‡ A *præcipe quod reddat* will lie against

2 Bl. Comm.
120. 258. Litt.
b. 1, s. 55 57,
& Co. Litt. 41,
b. &c. 2 Bac.
Ab. 561. 10
Vin. Ab. 296.
4 Comyn's Dig.
41. 1 Cruise's
Dig. 4th ed.
102.
Co. Litt. 41, b.
42, a.

* If tenant *pour autre vie* hold over after the death of *cestui que vie*, he will be tenant at sufferance, *vide ante*, p. 24.

† And, therefore, says Lord Coke (*Co. Litt.* 42 a), "if a tenant in fee simple make a lease of lands to *B.*, and to hold to *B.* for term of life, without mentioning for whose life, it shall be deemed for the life of the lessee, for it shall be taken most strongly against the lessor.—But if tenant in tail make such a lease, without expressing for whose life, this shall be taken for the life of the lessor, on the principle that where the words of a deed may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."

‡ The effect of the surrender, will be that the estate of *A.* will merge in that of *B.*, and *B.*'s estate will be accelerated

a tenant *pour autre vie* ; for he, *being tenant of the freehold*, must answer to the claims of

and brought into possession. And, therefore if it be the wish of the parties that both estates should be kept on foot, *A.* must convey his interest to a trustee for *B.*, so that if *B.* shall die in *A.*'s lifetime, his representative may be entitled during the remainder of the life of *A.* But if it be the object of the parties to merge the estate of *A.*, care must be taken, there be no intervening estate in a third person between the estates of *A.* and *B.* (such as an estate in trustees to preserve contingent remainders or the like,) to prevent the operation of the surrender. It sometimes happens that on the marriage of a person entitled to an estate for life in remainder with powers of jointuring, and charging with portions *when in possession*, the tenant for life in possession is willing to concur in enabling the remainderman to exercise his powers forthwith : and for that purpose a lease is first granted to a trustee for the tenant for life ; and then, in case of an intervening estate in trustees to preserve contingent remainders, the tenant for life conveys, or (if there is no such estate) surrenders his life estate to the remainderman, who thereupon assumes to exercise his powers. To the first of these plans *Mr. Butler* has objected in his note *Co. Litt.* 271 b., that if the words of the power are "when in possession under the limitations," the words of the power are not complied with, the party being in fact tenant *pour autre vie*, under the conveyance ; and that if the words, "under the limitations," are not in the power, they ought to be implied, and consequently the power cannot be well exercised. But the other of the plans, when practicable, he seemed in the former editions of his Notes to consider free of objection ; but in his last edition he has stated the point doubtfully. *Sir Edward Sugden*, in his *Essay on Powers*, 1 Vol. 356, Edit. 6, argues strongly that even in the latter case the powers cannot be duly exercised, on the ground that the transaction is a fraud on the

strangers; and hence such an estate cannot be created to commence *in futuro*.

Vide preceding chapter, p. 63, *in notis*.

This estate, being an estate of freehold, must

subsequent remainderman, in the event of the death of the donee of the power in the lifetime of the tenant for life in possession; and, consequently, charging the estates with burdens, to which, without the assistance of the tenant for life in possession, they would not have been subject; and in the later editions of his *Essay on Powers* he has cited a case recently determined in the Court of King's Bench, *Coxe v. Day*, 13 East, 118, which he seems to consider in support of his reasoning. This case shortly was—an estate was settled on father for life, with remainder to son for life, with power for the father during his life, and *after his decease*, for the son to grant leases for twenty-one years in possession. The father conveyed his life estate to the son, reserving a rent. The son being in possession made a lease under the power in his father's lifetime, and the lease was held void. Now we beg to remark, that although we consider there is much force in *Sir Edward Sugden's* argument against the validity of the exercise of the power on an actual surrender of the prior interest, yet we cannot think the case of *Coxe v. Day* strengthens that argument, or is even in point. In the principal case the requisite of the power, *viz.* being in possession, is complied with; and the ground of objection is fraud. But in *Coxe v. Day* the terms of the power were not satisfied; and it was not on the part of the defendant argued that the son might make the lease by virtue of the power limited to himself under the settlement, but that he made it by virtue of the power limited to his father as the assignee of his father's estate, a position perfectly untenable. We have made this remark to show that the question, whether the mode formerly approved by *Mr. Butler* of exercising the power is maintainable or not, is as open to argument since, as before the case of *Coxe v. Day*.

be created by some mode of conveyance which will pass the freehold in possession;* and may be transferred, that is conveyed, during the lives of the *celles que vies*, by the common mode of conveying freeholds. It may also be surrendered to the immediate reversioner, [or remainderman,] though that reversioner, [or remainderman,] be only tenant for his own life, [as before observed.]

29 *Car.* 2, c. 3,
s. 12. 14 *Geo.*
2, c. 20, s. 9.

If an estate for the lives of *A.*, *B.*, and *C.*, had been conveyed to *D.* without more, and *D.* had died, living *celles que vies*, the person who first entered, might have enjoyed the lands during the lives of *A.*, *B.*, and *C.* But by the statutes of *Car.* 2, and *Geo.* 2, *D.* [the person entitled to an estate *pour autre vie*, was empowered to] dispose of the estate by his last will (to be executed according to the Statute of Frauds, it being an estate of freehold); or, if he died intestate, [and there was no special occupant named,] it passed to his executors or administrators, and was distributed among the next of kin.† [Such parts

* This observation must, of course, be confined to those cases in which an estate *pour autre vie* is intended to be created out of an estate *in possession*. For an estate *pour autre vie* may, like any other interest, be created out of an estate in remainder or reversion, by way of grant only.

Occupancy.

† The estate by occupancy deserves consideration. By the common law, if lands had been limited to *A.* for the life of *B.*, and *A.* had died in *B.*'s lifetime, an estate arose by general occupancy; for as the lands could not go to the heir for want of words of inheritance, nor to the executor or

of the two statutes above referred to as related to Wills have been recently repealed by the statute 1 Vict. c. 26 ; and new enactments have been substituted, by which important alterations have been introduced into the law respecting testamentary dispositions made upon or after the 1st day of January, 1838, as will be after noticed.]

But, though this be an estate of freehold, it

administrator in respect of the estate being freehold, there was no legal owner, and the law gave it to the first person who could enter ; and, therefore, if such tenant *pour autre vie* had made a lease of the lands, and had died during the life of *cestui que vie*, the tenant in possession might have held the freehold *pour autre vie*. And so in case of a dispute between tenant for years and lessee at will which of them should be general occupant, it was adjudged for the lessee at will. And the common law also held the general occupant was not subject to the debts of the grantee *pour autre vie*. If, however, the estate was limited to *A.*, and his heirs during the life of *B.*, and *A.* died in *B.*'s lifetime, the heir was held to be entitled, not as heir, although the estate is in some of the books inaptly called a descendible freehold, but as special occupant ; and as he did not claim *as heir*, he was not subject to the specialty debts of his ancestor, and might plead *riens per descent*. And it was held generally that an estate *pour autre vie* was not devisable. It was also held that there could not be a general occupancy in incorporeal hereditaments, but they might be limited to the heir as special occupant, although in the case of *Ripley v. Waterworth*, hereafter mentioned, the Lord Chancellor is, by mistake, made to say, there could have been no special occupancy of an incorporeal hereditament, which is contrary to all the authorities. It seems, however, clear they could

Carth. 376.
Oldham v. Pickering,
Butl. n. 5, to
Co. Litt. 41, b.
Index, tit.
Dower.

2 *Bac. Ab.* 564.

Cited 1 *Vern.*
233.

Raggett v. Clarke, 1 *Vern.*
233.

Per Lord Kenyon, in *Atkinson v. Baker*,
4 *Term Rep.*
229.

may be limited to *D.*, his *executors and administrators*, as well as to *D.* and his *heirs*; for the successors of *D.* take as *special occupants*, and not by descent. And this mode of limitation is often preferable, as it frequently saves the premises or estate from the inconveniences of a minority.

[In the recent statute for the amendment of the law relating to wills, there is a special enactment respecting estates *pour autre vie*. By the

² *Roll. Ab.* 151. not be limited to executors or administrators, as special
² *Bac. Ab.* 566. occupants.

Whether *corporeal* hereditaments could have been limited to executors or administrators as special occupants, has been doubted by high authority: see the observations of *Lord Redesdale*, in *Campbell v. Sandys*, 1 *Sch. & Lef.* 288, and see *Roll. Ab.* title *Occupancy*, G. 2. *St. John's College v. Fleming*, 2 *Vern.* 320. *Comyn's Digest*, title *Occupant*, *Dyer*, 328 b. *Salter v. Butler*, *Cro. Eliz.* 901, and *Mr. Hargrave's* note, *Co. Litt.* 41 b. That they might be limited, see *Lord Hardwicke's* opinion, in *Westfaling v. Westfaling*, 3 *Atk.* 460. *Duke of Marlborough v. Lord Godolphin*, 2 *Ves.* 61. *Williams v. Jekyl*, and *Elliott v. Jekyl*, 2 *Ves.* 681. See also *Roll. Ab. Occupancy*, G. 2, and *Duke of Devon v. Kinton*, 2 *Vern.* 719; and see also an able note of *Sir Edward Sugden*, in his *Treatise on Powers*, vol. 1, p. 245, 6th Ed. The recent case of *Riply v. Waterworth* has it seems, to us, decided the question in the affirmative; and, indeed, the weight of the older authorities is altogether in favour of the limitation.

To remedy the evils of occupancy the statute of the 29 of *Car.* 2, c. 3, called the Statute of Frauds and Perjuries,

6th section it is enacted, that if no disposition by will shall be made of any estate *pour autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pour autre vie*, whether freehold or customary freehold, tenant right of customary or copyhold, or of any other tenure,

enacted, that “an estate *pour autre vie* should be devisable by will, executed in the presence of three or more witnesses; and if no such devise was made, it should be chargeable in the hands of the heir, if it should come to him by special occupancy as assets by descent; and in case there should be no *special occupant*, it should go to the *executors or administrators* of the party, that had the estate thereof, by virtue of the grant, and should be assets in their hands.” It is remarkable, the statute does not refer to the executor or administrator as special occupant: nor did it declare, to whom the residue or surplus, which should remain in the hands of the executor or administrator *under the statute*, should belong. In the case of *Oldham v. Pickering*, 2 Salk. 464, Carthew, 376, the latter question arose. The grantee *pour autre vie*, died intestate, and there was no special occupant. The next of kin claimed the residue, as undisposed-of personal estate: but the Court determined, it was *not* distributable amongst the next of kin; for, notwithstanding the alteration by the statute, it remained freehold estate; and, in proof of it, it was mentioned, the administrator must answer the *præcipe* of a stranger.

This was the occasion of the enactment of the 14 Geo. 2, c. 20, s. 9, which, after reciting the statute of Car. 2, and

and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by

that doubts had arisen, where no devise was made of such estates, to whom the surplus, after the debts of such deceased owner thereof were fully satisfied, should belong, enacts, "that such estates *pour autre vie*, in case there "shall be no special occupant thereof, of which no devise "shall have been made, according to the said act, for "prevention of frauds and perjuries, or so much thereof as "shall not have been devised, shall go, be applied, and "distributed in the same manner as the personal estate of "the *testator or intestate*." On a consideration of the wording of these statutes it seems clear from the circumstances of the Statute of Frauds using the words "*executors or administrators*" in the declaration of the parties, to whom the estates should go, in the event of there being no devise according to that statute, and no special occupant, and of the statute of the 14 *Geo. 2*, providing, that in such event the surplus shall be distributed in the same manner as the personal estate of the "*testator or intestate*;" that both statutes contemplated the case of an intestacy of the leaseholds for lives, at the same time that there might be a valid disposition of the personal estate by will; but the latter statute omitted to provide in express terms for that event; or, in other words, to state whether the surplus should, in such case, go according to the personal estate disposed of by the will, or as undisposed-of personal estate; nor was provision made for the surplus, which might be in the hands of an executor or administrator as special occupant. In the case of *Ripley v. Waterworth*, 7 *Ves.* 425, both points were considered. Lands had been limited to a man, his executors, administrators, and

reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as personal estate of the testator or intestate. The 34th section of the act provides, that

assigns *pour autre vie*: he died, having published his will (not attested according to the Statute of Frauds), and appointed an executor, and made a residuary bequest of his personal estate. There were three distinct claimants, the heir at law, the residuary legatee, and the next of kin; and it should seem a claim was made on behalf of an administrator for his own benefit. For the heir at law it was urged, that it was real estate, *viz.* a descendible freehold, that it would not pass by an unattested will, and an executor could not at common law take as special occupant; and, therefore, the heir at law was entitled. For the residuary legatees and next of kin it was urged, that an executor *might* at common law take an estate *pour autre vie*, as special occupant; and that even prior to the Statute of Frauds, it was assets in his hands; and that it would be strange if (the statute providing, where there is no special occupant it shall go to the executor) it should not go to the executor, where it is expressly given to him; and that the executor would as special occupant take it as personal estate, chargeable with debts, and subject to application as personal estate, after debts paid.—The Lord Chancellor was of opinion, it could in no event go to the heir; that it did not belong to the administrator; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate by a will sufficient to pass personal estate, and therefore he must be considered as holding it for the residuary legatee. *Lord Eldon* compared the case with that of stock which, by the several acts creating it, is disposable by will attested by two

See the *Duke of Devon v. Kinton*, *supra*.

Miller v. Have-wood, 18 Ves. 273.

the act shall not extend to any estate *pour autre vie* of any person who shall die before the 1st day of January, 1838.

It will be observed that the 6th section in part re-enacts the 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9 ; and, supplying the deficiencies

witnesses ; but which *Lord Thurlow* said, if not so bequeathed, yet devolving upon the executor, should devolve upon him in trust for those who are entitled to the personal estate. If the executor die intestate, the estate it seems will go to *his* administrator, and not to the administrator *de bonis non*. See *Oldham v. Pickering*, and *Ripley v. Waterworth*, *supra* ; but it will be advisable to take out administration to both. In *Atkinson v. Baker*, 4 *Term Rep.* 229, a point arose, to whom the estate *pour autre vie* would go if limited to a man, his *heirs, executors, and administrators*, whether (in case of intestacy) to the heir, or administrators : and it was argued in favour of creditors generally, that the administrator was entitled ; but the Court decided for the heir.

[In *Doe v. Robinson*, 8 *Barn. & Cress.* 296, the Court of K. B. decided that an estate *pour autre vie*, limited to the grantee, his *heirs and assigns*, and of which only a partial interest was devised by the grantee, did, upon the determination of the partial interest, living *cestui que vie*, devolve upon the testator's heir as special occupant. In that case lands were limited to *A.*, his *heirs and assigns, pour autre vie* ; *A.* devised the lands to *B.* without words of inheritance ; and the Court, being of opinion that *B.* only took an estate for life, decided that upon *B.*'s death, living *cestui que vie*, the lands devolved upon *A.*'s heir as special occupant]

[It was, until a recent decision, considered doubtful whether, if a *rent* were limited to a man, his *executors and administrators, pour autre vie*, and the grantee died, living

of those enactments, comprehends estates *pour autre vie* in incorporeal hereditaments, and in real estate of every tenure.]

An estate *pour autre vie* may be limited over by way of remainder;* and in effect, be en-

the *cestui que vie*, and without having disposed of it in his lifetime, it was not determined, notwithstanding the statutes: but in *Bearpark v. Hutchinson*, 7 Bing. 178, the case referred to, a rent charge was granted to a person (generally) without words of limitation, and it was decided that, upon the death of the grantee intestate, living *cestui que vie*, the estate *pour autre vie* was assets in the hands of the administrator, within the statute 29 Car. 2, c. 3, s. 13. *A fortiori*, therefore, it would be assets, the administrator being named in the grant. In the above case, *Tindal*, C. J., delivered the opinion of the Court of C. B., that, although there could not be a *general* occupancy of a rent, before the statute, nor in strictness, *special* occupancy, because there could be no occupancy of any thing which lay in grant, yet, upon the authority of *Lord Coke* and other early writers, it was said there might be a *quasi* special occupancy; and as the statute was remedial, it was the soundest construction of the second branch of the 15th section, to hold that it included not only all such estates *pour autre vie* as were so in strictness, but also all such as were, in common parlance, held to be the subject of occupancy.]

* And the remaindermen (if not barred) will take as special occupants. An estate *pour autre vie* may be also limited by way of executory devise, or future use: and it is argued by *Mr. Butler*, in his note in the 6th edition of *Fearne's Contingent Remainders*, p. 500, that "although the executory devise, or future use, be limited to take effect at a period which exceeds the limit prescribed by law for the vesting of

Harg. n. (5.)
to *Co. Litt.*
20, a.
Fearne's Cont.
Rem. & Exec.
Dev. 6th ed.
495, &c.
6 *Durnf. &*
East, 289.
Doe d. Blake
v. Luxton.
And there may
be a *possessio*
fratris and an
executory de-
vise of an occu-
pancy, 1 *Fox &*
Smith, Rep. 4.
1 *Rowe Rep.*
446, *et vide*
1 *Meriv.* 654,
and 3 *P. Wms.*
266.
Kendall v.
Mickfield,
Barn. Ch. Ca.
49. And see
5 *Geo.* 3, c. 17,
as to cases of
tithes by
ecclesiastical
persons, &c.
Saltern v. Sul-
tern, 2 *Atk.*
376.

tailed [by any conveyance to uses,* by way of trust, or by devise]. But those who had interests in the nature of an estate tail [might even before the recent statute 3 and 4 W. 4, c. 74] bar their issue, and all remainders over, by alienation, without fine or recovery, as by lease and release, surrender, &c.† and the having issue is not

such estates; yet (that if there be not a tenant right of renewal) it may be supported on the ground that the interest itself, in which it is created, does not exceed that boundary; and therefore it is not necessary to connect the continuance of the estate itself with the ulterior limitation, so as to make it part of the event on which the ulterior limitation is to arise." We need not remark that although this ingenious argument may, if necessary, be resorted to in support of a limitation, yet it cannot be relied on in practice.

[* *Norton v. Frecker*, 1 *Atk.* 523.]

† It was once doubted, whether tenant in tail of an estate *pour autre vie* could by any means bar the remainders over, *Low v. Burron*, 3 *Peere Wms.* 266. But it has been determined, as stated in the text, that any alienation by the tenant in tail will bar the remainders: and they will be also barred by the surrender by tenant in tail of the old lease and acceptance of a new one, although the trustees in whom the legal interest is vested do not concur; and even by articles in equity, 1 *Atk.* 525. In *Doe v. Luxton*, 6 *Term Rep.* 293, *Lord Kenyon* expressed a strong opinion that such remainders over might also be barred by *will*; but the case did not call for a judicial decision; and *Lord Redesdale*, in *Campbell v. Sandys*, 1 *Sch. & Lef.* 295, has expressed a contrary opinion.

It may be further remarked that tenant *pour autre vie* is entitled to emblements on the death of *cestui que vie*, *Co. Litt.* 55 b. And that although the estate be limited to the

Compare *Sug. Gilb. U.* 277, with 3 *Meriv.* 347.

Baker v. Bayley, 2 *Vern.* 225. *Blake v. Blake*, 3 *P. Wms.* 10, n. 1. Now exploded, *Dillon v. Dillon*, 1 *Ball & Bea.* 77. *Coop.* 185, *et vide* 2 *Eden*, 339.

essential, as in the case of a conditional fee at common law.

heir as special occupant, there is neither curtesy nor dower of it.

With respect to forfeiture and waste, the acts of tenant *pour autre vie* are controlled by the same principles as those which apply to the acts of tenant for life; for a statement of which we beg leave to refer to the next Chapter.

[That an estate *pour autre vie* is subject to the operation of the rule in *Shelly's* case, see *Low v. Burron*, 3 *P. Wms.* 263. *Ex parte Sterne*, 6 *Ves.* 156.]

CHAP. V.

OF AN ESTATE FOR LIFE.

Litt. s. 56, 57.
Co. Litt. 41, b.
 2 *Bl. Com.* 120.
 1 *Rolle's Ab.*
 843. 2 *Bac. Ab.*
 558. 10 *Vin.*
Ab. 287. 4 *Co-*
myn's Dig. 41.
 1 *Cruise's Dig.*
 4th ed. 101.

By an estate *for life*, generally, is understood an estate for one's own life, and not for the life of another.

Like that, however, it cannot* be made to commence *in futuro*, it being an estate of *freehold*; and for the same reason, [before the statute 7 & 8 Vict. c. 76, it must have been] created or transferred by livery of seisin (*secundum formam Chartæ*), lease and release, bargain and sale enrolled, or be surrendered to him in reversion.†

* [It cannot by conveyance operating at common law, but it may be limited *in futuro* through the medium of the Statute of Uses.]

† We beg to refer the student to our Notes in the preceding Chapter, "Estate of Freehold."

Lord Coke mentions (*Co. Litt.* 42 a.) several instances of interests of uncertain duration, the tenants of which may, in pleading, allege they are seised generally for the term of their lives, *viz.* an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during coverture, or so long as the grantee shall dwell in

[But now, by the 2nd section of the above statute, a freehold may be created or conveyed by a deed without the accompaniments of livery of seisin, lease for a year or enrolment.]

such a house, or so long as he pay ten pounds, or until he be promoted to a benefice; and another instance is also mentioned in the note 243, *Lib. 1. viz. to B. till A. makes I. S. bailiff of his manor.*

Mr. Watkins has not treated on the modes by which an estate for life may be destroyed in the lifetime of the tenant, nor on the incidents annexed to the estate for life. It will therefore, be necessary to say a few words on these points.

An estate for life [previously to the 7 and 8 *Vict. c. 76*, might have been] forfeited by any act which divested, or displaced the remainders, or reversion, as by feoffment, [and before the statute 3 and 4 *Will. 4, c. 74*, for abolishing fines and recoveries by] fine “*sur conuzance de droit cum ceo*,” &c. by tenant in possession, or common recovery, or by an assertion of ownership on record, as by a fine “*sur conuzance de droit come ceo*,” &c., by tenant for life in remainder, or by the acknowledgment on record of the ownership in another, as by the acceptance of a fine “*sur conuzance de droit come ceo*,” &c., from a stranger. But if the person having an *immediate* estate of inheritance in remainder concurred in the fine, or, it seems, if a person, having either an immediate or remote estate of inheritance in remainder, concurred in the common recovery: or if the tenant for life himself had a remote estate of inheritance in remainder, and suffered a common recovery, there would be no forfeiture, nor would there be a forfeiture in any case if the estate were equitable. And the forfeiture by fine also would have been saved if the fine was in the concord confined to the life of tenant for life.

A conveyance by lease and release, bargain and sale enrolled, or covenant to stand seised, being what the law terms innocent conveyances did not work a forfeiture, although professing to

1 *Leo. 40.*

Co. Litt. 252.

Bredon's case,
1 *Co. 76.*

Smith v. Clyff-
ford, 1 *Term*
Rep. 738.

Sed vide Pel-
ham's case,
1 *Co. 3.*

Hunt v. Bourne,
1 *Salk. 340.*

carry the fee, for they passed no more than the releasor, bargainor, or covenantor, might lawfully part with, nor would a grant work a forfeiture. An estate for life might be also passed by fine "*sur concessit*," which worked no forfeiture. And it might be surrendered by fine "*sur conuzance de droit tantum*." But, if tenant for life in possession levied a fine "*sur conuzance de droit come ceo, &c.*" to tenant for life in remainder, it was a forfeiture of both their estates.

[But now by the 7 & 8 *Vict. c. 76, s. 7*, it is enacted that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised, as the case may be.]

As incidents annexed to his estate, tenant for life may cut underwood, *Co. Litt. 53, a.*, and work open mines, and new shafts or pits to pursue the old veins. He may also work any mines lawfully opened by a preceding tenant in tail, although subsequently to the settlement under which he claims. But if he open a new mine it is waste. He may also fell timber for repairs, but not otherwise; and if he sell the timber, and apply the money in repairs, it is waste. He is entitled to reasonable estovers, *viz.* housebote, ploughbote, and haybote, without assignment, unless he is restrained by covenant or agreement: housebote is a sufficient allowance of wood to repair and burn in the house; ploughbote, sufficient wood for making and repairing instruments of husbandry; and haybote, for repairing fences, &c. He is bound to keep the buildings in repair, and to repair the banks and walls against the sea and rivers. And if he convert one species of land into another, it is waste, *Co. Litt. 53, b.* And cutting down decayed timber is also waste.

By the common law no action for waste would lie against the grantee for life or years. But by the statutes of 52 *Hen. 3, c. 24*, and 6 *Edw. 1, c. 5*, full damages might be recovered by the owner of the inheritance for waste committed, and the place wasted recovered. But no one was

Co. Litt. 233, b.
Note 147.

Piggot v. Salis-
bury, 2 Mod.
109.

Smithe v. Abell,
2 Lev. 202.

Clavering v.
Clavering,
2 P. Wms. 388.

Co. Litt. 53, b.

[1 *Cruise's Dig.*
tit. 3, c. 2. Ed.
4.]

Ibid.

2 Comm. 35.

Co. Litt. 53, b.

Perrott v. Per-
rott, 3 Atk. 95.
2 Inst. 300.

entitled to an action for waste, except the person who had the *immediate* estate of inheritance, or reversion, and to whose disherison the waste was committed; and if, therefore, there were an estate for life, interposed between the estate in possession and the first estate of inheritance, and the tenant in possession committed waste, and died in the lifetime of the intermediate remainderman, the action for waste was lost for ever. But if the intermediate remainderman died, or surrendered his estate, the action would lie: nor would an intervening estate for years prevent the remedy. But no one could maintain the action who had not an estate of inheritance at the time when the waste was committed.

The action for waste had, however, [long before its abolition by the statute 3 & 4 *W.* 4, c. 27, s. 36—38,] given way to an action on the case in the nature of waste, which may be brought by any one in remainder, or reversion for years, life or inheritance: and the Court of Chancery will grant an injunction on a bill by tenant for life in remainder; and if tenant in possession sever the timber from the inheritance, the first person *in esse*, having an estate of inheritance, may maintain trover, notwithstanding there are intermediate contingent estates; and the Court of Chancery will order timber to be felled, if for the benefit of the estate; and will also interfere to prevent collusion between the tenant for life and a remote remainderman to the injury of unborn children; and will interfere if the tenant for life has himself the next vested estate of inheritance.

Tenant for life without impeachment of waste, may open mines and fell any timber on the estate, except ornamental timber, and convert it to his own use, and is entitled to the timber of building blown down, or to timber blown down on the estate; and may grant leases out of his interest, without impeachment of waste: but neither he nor his lessee must maliciously waste the estate by pulling down houses, &c. for if they do, the Court of Chancery will grant an injunction, and they are bound to keep the houses in repair.

Co. Litt. 53, b.

Moore, 387.

Co. Litt. 54.
2 *Inst.* 301.
305.

2 *Saund.* 252,
n 7. *Perrott v.*
Perrott, *supra*.

Uvedall v.
Uvedall, 2
Roll. Ab. 119.
Whitfield v.
Bewit, 2 *P.*
Wms. 240.
3 *P. Wms.* 268.
Garth v. Cot-
ton, 1 *Ves.* 524.
Williams v.
Duke of Bol-
ton, 3 *P. Wms.*
268, n.

Smythe v.
Smythe, 2 *Swan*.
251.

Lewis Bowles's
case, 11 *Co.* 84.
W. Jones, 51.
Vane v. Lord
Barnard,
2 *Vern.* 738.
Parteriche v
Powlett, 2 *Ath.*
383. *Co. Litt.*
55.

Tenant for life, or his executors, and his under-tenants, are entitled to emblements, in all cases where his estate is determined by the act of God : but if it be determined by his own act he will not be entitled to emblements ; and it is doubtful whether, in such case, his under-tenants will be entitled to them.

Cru. Dig. Vol.
1, 101. 4th ed.

CHAP. VI.

OF AN ESTATE IN DOWER.

DOWER is an estate *for life*, which the law gives the widow [married before or upon the 1st day of January, 1834] in the *third part* of the *lands and tenements* of which the husband was *solely* [and legally] *seised, at any time during the coverture*, of an estate in *fee*, or in *tail*, in *possession*,* and to which estate in the lands and

2 *Bl. Com.* 129.
Litt. b. 1, c. 5,
 & the *Commen.*
 1 *Roll. Ab.* 675.
 2 *Bac. Ab.* 356.
 9 *Vin. Ab.* 210.
 3 *Comyn's Dig.*
 532. 1 *Cruise's*
Dig. 151. 4th
 ed.

* The requisites to dower, says *Lord Coke*, are marriage, *seisin*, and *death* of the husband. The widow is entitled to dower of the corporeal and incorporeal hereditaments of which her husband dies seised, and a *seisin in law* is sufficient; for if land descend on the husband, and he die seised before actual entry, the widow shall be endowed: but a *seisin* there must be in deed or law during the coverture: and, therefore, she shall not be endowed of a remainder or reversion expectant, on an estate of freehold granted before marriage: but she shall, if expectant on a term for years, and shall have a third part of the reversion and of the rent. Nor shall she be endowed of a mere right or possibility; nor of a *seisin* for an instant, as if there were two joint tenants, and one make a feoffment in fee, *Co. Litt.* 31, b.; nor of lands both given and taken in exchange, but she shall have her election; nor of *dos de dote*, that is, of lands which descend on the husband, and are assigned to his mother in dower, for the son's estate is defeated by the assignment, and

Co. Litt. 32, a.

Co. Litt. 31, a

Co. Litt. 32, a.

tenements *the issue of such widow might, by possibility, have inherited.**

[By the statute 3 & 4 W. 4, c. 105, a widow, (not being an alien) married after the 1st day of January, 1834, is dowable out of all real hereditaments to which her husband was at the time of his death solely entitled, for any estate of inheritance in possession, at law or in equity (s. 2, 3); and not absolutely disposed of by his will (s. 4); nor exempted from dower by his declaration, in any deed (s. 6) or will (s. 9); or by devise to her of hereditaments of which she would otherwise be dowable (s. 9); never-

he has but a reversion expectant on a freehold: but if the son took as a purchaser, or his wife was first endowed, in either case the wife shall be endowed on the mother's death; and the rule of *dos de dote* will not apply, unless dower be actually assigned to the mother. The widow shall not be endowed of an estate of which her husband is mortgagee in fee, nor if he be an alien, nor if he be attainted of treason, 5 Edward 6, c. 11. But she shall not be barred, if he be attainted of felony only, 1 Edward 6, c. 2, and her dower is not lost by a divorce *a mensâ et thoro* for adultery. But it is, if she quit her husband's house with the adulterer, unless the husband be reconciled; and the widow of an idiot, or one *non compos mentis*, is entitled to dower.

* This must be attended to; for if lands be limited to a man and the heirs of his body by his then wife, and she die, leaving her husband, and he marry again, the second wife shall not be endowed, for her issue could not by possibility inherit.

Hitchens v. Hitchens,
2 Vern. 403.

Co. Litt. 31, a.

Co. Litt. 32, b.

Ibid.

Co. Litt. 31, a.
sed vide 15 G.
2, c. 30.

Litt. Sec. 53.

theless, the debts and liabilities of the husband and his partial dispositions by will or otherwise taking precedence (s. 5, 7, 8).

This estate, though created by act of law, may be conveyed or prevented by the act of the party.

Before assignment* and actual entry, the freehold is not in the widow ; and, by consequence, the mode of passing her claim differs before and after entry.

Before entry she has only a *right*, which must be *conveyed* [*i. e.* extinguished] by *release*, and that to the *person in possession of the lands*, [or rather to the person having the freehold in possession of the lands,] as to him only a release of right can be made.—*After* entry, the pos-

* The widow's third must be *assigned*, for she cannot by the common law enter into her dower before assignment ; *Co. Litt.* 32, b. and, therefore, if the heir refuse, she is driven to her writ of dower, and the sheriff must assign her dower by metes and bounds, unless the husband be seised as tenant in common, when she shall have a third part of the undivided part. If *Litt. Sec.* 44. the inheritance be entire, and such of which an assignment of dower cannot be made, she shall have the third part of the profits, as of a fair, an office, &c., and the third presentation to an advowson. After an assignment made, the widow may *Co. Litt.* 32, a. enter, and she shall be *in* of the estate of her husband ; and paramount all incumbrances, mortgages, or leases made by him [during the coverture. The widow is entitled to have a third in value of all the lands, estimating the value as it

session or freehold of her third is in herself; and, consequently, the proper mode of conveyance, *to the person immediately in reversion* will then be *a surrender*; and to *a stranger* it may be conveyed by feoffment, with livery (*secundum formam chartæ*), lease and release, or bargain and sale enrolled, [or by any other mode of conveyance, by which a freehold may be transferred.]

¹ *Cruise's Dig.*
177, 4th ed.

⁵ *Ib.* 116. 383.

Pig. Rec 66.

123. 195

Harg. N. to

Co Litt 121, a.

Plowd. 514.

Eare v. Snow.

During the life of her husband, the wife might [previously to the statute 3 & 4 W. 4, c. 74] pass, or rather bar, her right to dower, by fine or recovery; which were matters of record; and in the process of which she was secretly examined, to prevent or remove the suspicion of any compulsion in the husband. [And now she may, with the concurrence of her husband by deed in conformity with the requirements of the above statute, s. 77, 79, &c., bar her right of dower.]

And as dower [of a woman married on or before the 1st day of January, 1834] is claimable out of those lands and tenements of which the husband was seised AT ANY TIME DURING THE

was at the time of the assignment, although they had been conveyed away during the husband's life, and improved in value by buildings erected after the conveyance and before the assignment, *Doe v. Gwinnell*, 1 *Ad. & El.*, N. S. 682.]

COVERTURE, the alienation of the husband alone after marriage will not bar her claim;* and, therefore, it is necessary that care be taken in conveyances by a married man that the widow [so circumstanced] be effectually precluded from her dower (if entitled) by her joining [with her husband in a deed duly acknowledged according to the mode prescribed by the above statute.]

Again, as dower is only claimable in such lands and tenements of which the husband was *solely seised* during the coverture, in *fee simple* or *fee tail in possession*,† several modes present themselves by which dower may be prevented or barred.

* In this respect dower [of a woman married upon or before the 1st Jan. 1834,] differs from the widow's freebench in copyhold or customary estate; for in general she is only entitled to freebench out of those copyhold or customary lands of which her husband *died* seised. But by the special custom of some manors [as that of Cheltenham, in Gloucestershire,] the widow is entitled to freebench of the lands of which her husband was seised at any time during the coverture, as in the case of dower at common law. [*Riddell v. Jenner*, 10 Bing. 29. *Doe d. Riddell v. Gwinnell*, 1 Ad. & El., N. S. 682.] 2 Ves. s. 631. 2 Watk. Cop. 60. Ed. 4.

† [The law with respect to the husband's being *solely* entitled *in possession*, is the same under the statute 3 & 4 W. 4, c. 105, but a *legal seisin* is not requisite: a widow married since the 1st Jan. 1834, is dowable out of equitable estates (s. 2, 3:) and therefore if an estate is conveyed to the husband, and another in fee, but in trust for the husband and his heirs, his wife will be dowable.]

2 Bro. C. C. 630.
Curtis v. Curtis.
 But see *ante*,
Introd p. xvii.
 and 1 *Wath.*
Copyh. 79.

And in the first place, [irrespective of the recent statute;] it is requisite to dower that the husband be *seised*; and, consequently, one mode of preventing dower is by creating *a trust*; for the Courts of equity have not permitted the widow to claim the dower of a trust estate.*

But this mode is objectionable, as it puts the legal freehold out of the husband.

Again, it is requisite to dower that the husband be *solely* seised; and, therefore, dower is sometimes barred by conveying the estate to *the husband and another person in joint tenancy*; in which case, as the husband was not *solely* but *jointly* seised, the dower does not attach [during the joint lives of the husband and his trustee.]

But this mode is also objectionable; for if the stranger or trustee die during the life of the husband, the husband will become *solely* seised, and so the end of such conveyance be defeated; [unless the husband shall have already parted with the estate;] and if the trustee survive the husband, the legal estate will be outstanding.

* This was rather a singular decision of the Courts of equity: prior to the Statute of Uses it seems there was neither dower nor curtesy of a use: trusts are now nearly what uses then were; and the Courts of equity have allowed curtesy of a trust, but have excluded dower. There seems no sound principle for the distinction: it has been generally disapproved, [and the law is now altered as before noticed.]

A third requisite to dower is, that the husband must be legally seised of an estate in fee simple or fee tail in *possession*. Therefore, a third mode is to put *the fee in remainder* ;* as by limiting to the husband for life, with remainder to another person during the life of the husband,† with remainder to the husband in fee or in tail. In this case the intervening estate to the other person prevents the remainder over from being executed in possession in the husband ; and he is only seised in *possession* of the estate for life.

So if the estate be limited to the husband and

* But to effect this, the intervening estate should be a vested estate of freehold : for neither a term for years, nor, it seems, a contingent estate of freehold, which never arises, and the possibility of which is determined by the death of the husband, will prevent the dower.

Cordul's case,
Cro. Eliz. 316.
Hooker v.
Hooker, *Rep.*
temp. Hardw.
13.

† It may at first view surprise the student that the limitation to the trustee during the life of the tenant for life, as proposed by *Mr. Watkins*, should consistently with the principle mentioned in the preceding note, have the effect of barring the wife's right of dower. *Primâ facie* it seems little more than a mere possibility of an estate or right of entry : but the case of *Dormer v. Parkhurst*, 18 *Viner*, 413, decided that a similar limitation to trustees to preserve contingent remainders was a good vested estate of freehold, on the principle that on a grant for life the grantor has an interest remaining in him to enter on the estate in case of forfeiture ; which interest when conveyed to trustees, is a remainder or legal estate ; and the case of *Duncomb v. Duncomb*, 3 *Lev.* 437, is in point, that under such a limitation as the present the dower is prevented.

a stranger for life, in joint tenancy, with remainder to the husband in fee or in tail, the husband shall hold the estate for life in joint tenancy with the stranger; and the remainder will be only executed *sub modo*, and not in possession. But this manner of limiting the estate is objectionable, for the reasons before noticed.*

* It will be observed, that the several modes before mentioned prevent the right of dower *from attaching*: but there is a mode of limitation (formerly in practice) by which the right to dower *attached* on the estate, subject (as it was apprehended) to be divested in the husband's lifetime. This was by limiting the estate to such uses as the husband should appoint, and in default thereof to him in fee; until the exercise of the power, the husband was actually seised of an estate of inheritance in possession, on which the right to dower attached. On the execution of the power, it was considered that as the appointee came in, as if named in the deed creating the power, as hereafter explained, he was in paramount the right of dower in the wife, and consequently held the estate discharged of the dower. If the power was not exercised, and the husband died, leaving the wife, her dower took effect. On the efficacy of this mode of limitation, considerable doubts were, however, entertained, on the principle, that dower having attached, it could not be defeated by an act of the husband alone; and in *Cox v. Chamberlain*, 4 *Ves.* 637, *Lord Alvanley* inclined to favour the doubt. In *Maundrell v. Maundrell*, 7 *Ves. Jun.* 567, the Master of the Rolls held the power itself wholly nugatory, and nothing distinct or different from the fee. But on a rehearing before *Lord Eldon*, Chancellor, 10 *Ves. Jun.* 246, he expressed a clear opinion that the power might subsist with the fee. But as he also held that the power was not in that particular case well exercised, the question whether an exercise of it would defeat the wife's dower was left undecided; and it

Where the husband was married on or before the 1st day of January, 1834, the best way of barring the wife's dower is to limit the estate *to such uses as the husband shall appoint*, which will give him the power over the whole fee; so that he may pass it to a purchaser without the concurrence of the wife or others; and the

Butl. n. (1.) to Co. Litt. 379, b. Fearn's Cont. Rem. & Exec. Dev. 6th ed. 347.

was the universal practice, we believe, in the case of such a limitation, to require a fine.

[Since the preceding annotation was published, the Court of K. B., upon a case sent by *Sir John Leach*, V. C., for their opinion, decided that the appointment defeated the wife's dower, *Ray v. Pung*, 5 *Bar. & Ald.* 561, S. C. 5 *Mad.* 310, also *Moreton v. Lees*, cited 5 *Mad.* 318, and 2 *Sugd. on Powers*, 35, *Ed.* 6. In consistency with the above decision, the same Court determined that a judgment creditor's lien upon the land was defeated by a similar exercise of the power. The case was *Doe v. Jones*, 10 *Bar. & Cress.* 459: there by lease and release, in 1826, lands were conveyed to such uses, &c. as *A.* should by deed appoint, and in default of and until appointment to the usual limitations to bar dower. In *December*, 1827, a judgment creditor sued out a writ of *elegit* upon his judgment, which in *Michaelmas* Term, 1822, had been entered up against *A.* In *March*, 1827, *A.* appointed the lands in question to *B.* for 500 years, for securing 4000*l.* and interest: the Court decided that the appointment to the mortgagee defeated the judgment creditor's lien, and the law was the same notwithstanding the mortgagee had notice of the judgment, *Skeeles v. Shirley*, 8 *Sim.* 153, affirmed 3 *Myl. & Cr.* 112. But now by stat. 1 & 2 *Vict. c.* 110, s. 13, judgments operate as a charge upon real estate, notwithstanding the power, so that the judgment creditor's lien will not be defeated by an exercise of his power as in the case above cited.]

purchaser, on the execution of the power, shall be *in* from the original conveyance, and so paramount the claims of the wife ; *and, in default of execution, to the husband for life, with remainder to A. B., his executors and administrators, during the life of the husband, with remainder to the husband in fee,** so that the limita-

* The student will observe that, under the limitation of uses, here recommended, the right of dower *never attaches* ; and, therefore, whether the power was exercised or not, the widow's claim is equally precluded. But it may be then asked, what is the use of the power ? Its object seems to be to meet the case of the trustee not concurring in the subsequent conveyance ; for as the appointee comes in above the limitations, they are all of them on the exercise of the power defeated as if they had never existed, and consequently no part of the legal estate is left outstanding. If the trustee should not concur, and there was no power of appointment, the purchaser would, under the conveyance, take a legal estate for the life of the grantor, and a trust estate in remainder for the life of the grantor, with a legal remainder in fee ; and thus part of the legal estate (*viz.* the legal remainder in the trustee) would be left outstanding. The power, therefore, is still inserted ; and *ex abundanti cautela* it is customary, even where the trustee does not concur, as well to exercise the power as to convey the interest. The student should, however, bear in mind, that an evil may at times arise from the exercise of the power ; for covenants real will not run with the land, unless there be a privity of person and a privity of estate : now the appointee comes in paramount the appointor, and consequently there is no privity of estate between them, and therefore a covenant entered into by the appointor will not run with the land so as to bind his appointee, who will come in above him, and hold the land discharged of the covenant, which will be personally binding

tion over in fee will be *in remainder* ; and by limiting the intermediate estate to the *executors and administrators of A. B.*, it will be more likely

only on the appointor and his representatives. Such was the case of *Roach v. Wadham*, 6 *East*, 289. *A.*, on the purchase of an estate, took a conveyance to uses to bar dower, and covenanted that he, his heirs and assigns, would pay the vendor a certain rent. He afterwards sold to *B.*, and appointed the use to him ; and the Court held *B.* was not bound as the assignee of *A.* to pay the rent. In a similar case it will be therefore advisable to insist on the purchaser taking a conveyance without a power of appointment, so that his covenants may run with the land, and bind his assignees. A difficulty may also, on the same principle, we apprehend, occur in the covenants for the title ; for, according to the modern practice of exercising the power of appointment and appointing to similar uses in bar of dower, there may be no actual conveyance of the ownership for a century ; for the student must remember that on the appointment of an use, the seisin is undisturbed, and remains in the original releasee or feoffee to uses, and each successive appointee comes in under the original seisin, so that there is no privity of estate between any of them, each set of covenants being personal between the covenanting parties, and not running with the land. This is a considerable inconvenience ; and it may be worth the consideration of the Profession, whether the evils which may attend the exercise of the power do not more than counterbalance any advantage which can be derived from it ; and whether it might not be more advisable to omit the execution of the power, and to take in all cases a conveyance of the interest, even although so minute a part of the legal estate as that vested in the trustee to bar dower should be left outstanding. And where the concurrence of the trustee can be obtained, no advantage is gained by the appointment.

3 *Pres. Abst.*
241. *Ath.*
Touch. 177, n.
2 *Sug. V. & P.*
79, ed. 9.

to prevent its vesting in a minor, in case *A. B.* die before the husband ; and the estate to *A. B.* being only an estate *pour autre vie*, may (notwithstanding its being a *freehold*) with equal propriety be limited to *his executors and administrators* as to his *heirs*, as they will not take by descent, but as special occupants.*

See *ante*, ch. 4, pp. 66, 67.

Co. Litt. 36, a. & b. 2 *Bl. Com.* 137. 1 *Atk.* 563. *Hervey v. Hervey*, n. (1) to *Co. Litt.* 36, b. and the books there referred to. Case of *Drury v. Drury*, 5 *Bro. Parl. Cas.* 570. *Williams v. Chitty*, 3 *Ves.* 545.

A woman [although married on or before the 1st January, 1834] may also be precluded from claiming her dower in any lands of which the intended husband shall be seised during the coverture, by accepting a jointure according to the statute of Hen. 8. So she shall be barred in equity by the acceptance of other considerations, such as do not fall within that statute, as a yearly sum of money, though not charged on any specific fund.†

* [In a conveyance to a person having a wife married on or before the 1st Jan. 1834, the limitation to the trustee to bar dower need not extend beyond the joint lives of the husband and his present wife ; when a conveyance is made to a man married after that day, the limitation may be to him in fee, the conveyance stating the fact of his marriage, and containing a short declaration that the lands conveyed shall not be subject to the dower of his present or any future wife.]

Co. Litt. 36, a.

† A strict legal jointure is described by *Lord Coke* to require six things, *viz.* the provision for the wife must take effect in possession or profit immediately after the husband's death ; it must be for the term of her own life or greater estate : it must be made to herself and no other for her ; it must be made in satisfaction of the whole, and not of part, of her dower ; it must be either expressed or averred to be

If there be any existing term which was created before marriage, there shall, in certain cases, be

7 *Ves.* 567, and
10 *Ib.* 246.
Maundrell v.
Butler's Notes
to *Co. Litt.*
208, a.

in satisfaction of dower ; and it may be made either before or after marriage : but if made after marriage, she may waive it, and claim her dower. If the jointure is made before marriage the wife will be barred, whether adult or infant, even if she be not party to the deed of jointure. But *Mr. Cruise* conceives, *Dig.* 4th ed. Vol. I. p. 200, s. 39, that she or her guardian (if under age), must have notice of the jointure, or else she will have relief in equity. She may be also barred by a mere equitable jointure : but if she be an infant, the provision must be as certain as her dower ; and she may be barred of dower by provision by the will of her husband, if the intent be expressed or clearly implied (but not otherwise) and she elect to take it in lieu of dower. See *Mr. Hargrave's* note, *Co. Litt.* lib. i. n. 227, 2 *Rop. Leg.* 530—547, *Ed.* 1828.

Drury v.
Drury, supra.
Caruthers v.
Caruthers,
4 *Bro. C. C.*
500.

By the statute of the 11 *Hen.* 7, c. 20, women seised of estates tail of the gift of their husbands are prohibited from alienating their estates, after the death of their husbands, without the concurrence of the heirs next inheritable, or of the persons who next after the death of the wife should have an estate of inheritance in the premises. But it provides that a woman may, notwithstanding, part with the estate for her own life only. In relation to this statute it has been determined, that if the estate be limited to the wife in fee, or in tail general, or if the remainder be limited to a stranger, and no inheritance be reserved to the husband, or his heirs, or if the lands be of copyhold tenure, 1 *Siderfin*, 41—73, the cases are not within the statute ; a trust estate and equity of redemption are, however, both within it : [and the powers of disposition given by the statute 3 & 4 *W.* 4, c. 74, s. 16, are not extended to married women within the statute 11 *Hen.* 7, c. 20, except with the assent of the husband.]

Dennis's case,
Dyer, 248, a.
Hughes v.
Clubb, Com.
369. *Foster v.*
Pitfall, Cro.
Eliz. 2, and
see *Sugden's*
Note, Gilbert,
243. *Clifton*
v. Jackson,
2 *Vern.* 489.

[But where the husband purchases an estate, and the whole

a *cesset executio* during the term. But it is said that there must be an *actual assignment* of the

consideration is paid by the wife's sister, on condition that the estate should be settled to the use of the husband and wife in tail, this, though within the letter, is not within the equity of the above statute; and the wife may, after the death of the husband, alienate. *Watkins v. Lewis*, 1 *Russ. & Myl.* 377.]

The seventh section of the statute of 27 *Hen.* 8, c. 10, enacts, that if the wife be lawfully evicted from her jointure lands, she shall have her dower out of the remaining lands of her husband: and in reference to this enactment *Sir Edward Sugden* seems to have fallen into a mistake, in his earlier edition of his treatise on the *Law of Vendors and Purchasers*, which it may be important to explain. He first noticed that some gentlemen required a fine on the purchase of lands where the wife had accepted an equitable jointure, which practice, he truly says, was discountenanced by the majority of the Profession; and that it seemed clear, if the wife should prosecute her writ of dower at law, equity would protect the purchaser, and condemn her in costs. He then remarked, that it was objected by the advocates for a fine, that if the fund on which the jointure was charged should be evicted from the jointress, she could claim her dower. And he added, that this objection seemed equally to apply to a legal jointure; and he stated the seventh section of the statute as his authority. He then proceeded to notice that when his first edition was published, he was not aware of any case in which the doctrine had been expressly established. But he remarked, it was never attended to in practice; and he had never heard the objection taken, which made him apprehensive he had fallen into an error: the point could not, he thought, so long have escaped notice. But he concluded that, unless in the case of a legal jointure a purchaser could call for the title, he could not in the case of an equitable

p. 317, 6th ed.
see p. 359, 9th
ed.

term to protect a purchaser against the dower of the widow of the vendor : for it is said also that

jointure ; for equity would act in strict analogy to legal jointures. And he adds, that since the publication of his first edition he had met with *Maunsfield's* case, *Hargrave's* notes to *Co. Litt.* 33, a. n. 202, which had expressly decided, in the case of a legal jointure, that the wife evicted from her jointure lands was entitled to dower ; and it was conceived that equity must in this respect follow the law ; and the author's impression, therefore, was, that where an estate would be subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor must either procure his wife to levy a fine of the estate at his own expense, or produce a satisfactory title to the jointure lands.

The opinion above hazarded has, we fear, led to much unnecessary expense ; and gave foundation to a practice for calling for a fine, or the title to jointure lands, in cases in which the demand could not be supported. [It is, however, omitted in the ninth edition of *Sir Edward Sugden's Treatise*.] The practice in the Profession, prior to the remarks we are animadverting upon, was, that a distinction should be taken between the case of a provision made by the husband by force of the statute without the wife's concurrence, which would be strictly *ex provisione viri*, and which would preclude her from dower equally as if she had concurred : and the case of a provision made for her before marriage, with her consent, which, if she were adult, would arise *ex contractu* : and that, in the first instance, if she was evicted from her jointure lands, she would be entitled to dower by the provision of the statute : but, that in the second instance, the transaction was grounded on a valuable consideration, and that whilst the jointure existed she had no legal claim to dower ; and, if she were evicted, a Court of equity would enforce the contract, and protect the other estate of the husband from her legal claim,

a term, while outstanding, is as much attendant in equity upon dower as upon the remaining interest in the inheritance.*

and that it was her duty before marriage to inquire into the title of her jointure lands.

We conceive this distinction to be sound ; and it will account for that apparent want of precaution with which *Sir E. Sugden* seems rather to charge the Profession, when he says, he had never heard the objection taken, and he was apprehensive he had fallen into an error, which it appears to us he had. And we certainly think, that in all cases in which an adult, on her marriage, accepts a provision legal or equitable for her jointure, and in bar of dower, she will be precluded by her contract from claiming dower, even if she be evicted from her jointure, and that a purchaser had not in any such case a right to require either a fine or the production of the title to the jointure lands, [neither can he now, that fines are abolished, call for the wife's concurrence in a deed acknowledged by her according to the form prescribed by the statute 3 & 4 W. 4, c. 74.] *Maunsfield's* case, before alluded to, is briefly stated ; and the circumstances under which the judgment was given are not recorded, and it is no authority on the precise point in question. The opinion of *Sir Thomas Plumer*, V. C., in *Simpson v. Gutteridge*, 1 *Mad. Rep.* 613, coincides with the observations we have made on this point.

Co. Litt. 36, b. It may be added, that if the wife concurred in a fine of her jointure lands, she would not be endowed of any of the other lands of her husband, [and the same observation is applicable to a deed of disposition by her under the above statute.] But a jointress is not precluded from her jointure, or even relief in equity to enforce it, by adultery, or living apart with another.

Sydney v. Sidney, 3 P. Wms. 269.

* As the husband, seised of an estate of which the wife would be dowable if she should survive him, cannot destroy her right to dower by his own act, so it seems to follow that,

[Widows are dowable of lands of inheritance in the British colonies abroad, where by Act of Parliament, charter under the Great Seal, order in council or other competent authority the law of England is established. *Jepson v. Reira*, 3 Kna. 130. *Freeman v. Fairlie*, cited *ib.* 130.]

By the 41st section of the 3 & 4 W. 4, c. 27, it is enacted that no arrears of dower shall be recoverable for more than six years.

Dower in some cases ceases upon the determination of the estate. 1. Where the fee is evicted by a title paramount; 2. Where the seisin of the husband is wrongful and the heir is remitted; 3. Where the donor enters for breach *Litt. s. 393. 1 Inst. 31, b.*

according to the doctrine in *Maundrell v. Maundrell*, he cannot, by his own act, cause the term to cease to be attendant upon dower. If the right of the wife to dower attaches upon *the freehold* in the lifetime of the husband, it must surely, according to *Maundrell v. Maundrell*, attach also upon the term *attendant upon such freehold*; as it is laid down in that case that the outstanding term “is *as much* attendant upon dower as the remaining interest in the inheritance; and therefore ought not to be set up by the latter against the former.” If the wife, therefore, cannot be deprived of the dower by the husband alone, it does not appear how she can be deprived by him alone of her right to *the attendance of a term* which is *as much* attendant upon *her* interest *as upon his own*; nor, consequently, how “an actual assignment” of such term can be properly made without her concurrence, or how that concurrence is to be legally given.—Note by *Mr. Watkins*.

Notwithstanding the doubt here thrown out by *Mr. Watkins*, it has been decided beyond question, as we have already mentioned in page 52, that if the term is assigned to a trustee

10 *Rep.* 98, a. of condition; 4. Where a person has a qualified or base fee, the right to dower ceases when the estate is determined; 5. Where an estate in fee simple is made determinable upon some par-

for the purchaser by the direction of the husband, the dower will be barred, although the purchaser has express notice of the marriage. But an actual assignment is necessary for that purpose, *Maundrell v. Maundrell*, *suprà*. And the Court will enforce specific performance against a purchaser from the husband, if there be an outstanding available term which can be assigned to a trustee for his protection, although the wife will not concur in the conveyance of the inheritance, 1 *Mad-dock*, 613, 618. [And where the term happens to be vested in the widow, as a trustee, the Court will compel her to assign it for the purchaser's protection against her own dower. This occurred in the case of *Mole v. Smith*, 1 *Jac. & Walk.* 665: there the freehold estate of *Watson*, a bankrupt, was sold by the assignees to *Smith*, who entered into possession under the contract, and afterwards filed his bill against the assignees, the bankrupt and his wife, for specific performance, and an assignment of three terms, which, upon the bankrupt's purchase, had been assigned to *Yelloly* to attend. The terms happened to vest in the bankrupt's wife as surviving administratrix of *Yelloly*; upon the bankrupt's death his widow claimed her dower, and insisted that she ought not to be compelled to assign the terms vested in her to a trustee for the purchaser, as a protection against her dower. *Sir Thomas Plumer*, M. R., expressed considerable doubt whether the Court could compel her to assign the terms. The cause came on again before *Lord Eldon*, C., on the 4th of April, 1822, 1 *Jacob*, 490, and his Lordship decreed, that as the trustee *Yelloly* (whom the bankrupt's widow represented) would, if living, have been compelled by the assignees to assign the terms to a trustee for the purchaser, in order to carry the

ticular event, if that event happens, dower will cease with the estate. (*)]

1 *Cruise's Dig*
165, ed. 4.
Co. Litt. 241, a.
note.

contract into effect, the widow was also compellable to assign them. Reg. Lib. B. 1821, p. 1726.)]

We have further to remark, that tenant in dower is subject to action for waste and to forfeiture, *Co. Litt.* 53 a, 54 a, and her concurrence was requisite in making the tenant to the *præcipe* in a common recovery, for she is not within the 14 *Geo.* 2, c. 20; and that by the custom of gavelkind she is entitled to a moiety, instead of a third, so long as she continues a widow and chaste, [of all the lands of which her husband was seised during the coverture.]

Rowe v. Power,
2 *New Rep.*
1 *Robinson's*
Gavelkind, 159.

[* The authorities of *Buckworth and Thirkell*, 3 *Bos. & P.*, 652, note, as to curtesy, and *Moody v. King*, 2 *Bing.* 447, as to dower, must be considered as forming an exception to the last proposition advanced in the text: they decide that dower and curtesy do not cease after the determination of the estate by conditional limitation or executory devise, through the death of the husband and wife without leaving issue. See 2 *Roper's H. & W. Ed.* 1826, *Addenda*, 502-8.]

CHAP. VII.

OF AN ESTATE BY THE CURTESY.

2 *Bl. Com.* 126.
Litt. b. 1, c. 4,
 and *Co. Litt.*
 29, a. to 30, b.
 4 *Comyn's Dig.*
 38. 7 *Vin. Ab.*
 148. 2 *Bac. Ab.*
 218. 1 *Cruise's*
Dig. 139, 4th
 ed.

AN estate by the curtesy, like that in dower, arises by act of law, and is an estate *of freehold*; and consequently, as it may be conveyed to a stranger for the life of the tenant by the curtesy, it must be conveyed by those means which the law appropriates for the transfer of freeholds, as by livery, or under the Statute of Uses.

It may also be *surrendered* to the heir or reversioner.

Morgan v.
Morgan,
 5 *Mudd.* 403.

As an husband shall have his curtesy of a trust, the same modes of prevention do not exist, as exist with respect to dower. But as he shall not have his curtesy of a remainder or reversion *on a freehold*, nor of a freehold in possession, that is not also *of inheritance*, the estate by curtesy may be prevented by placing either the freehold in possession, or an intermediate estate of freehold, or the inheritance, out of the wife.*

Doe v. Rivers,
 7 *T. R.* 276.

Litt. s. 35.

* To give title to tenancy by the curtesy, the wife must be seised in fee simple, or fee tail, and issue must be born alive,

Co. Litt. 30, which might by possibility have inherited, *Co. Litt.* 29, b; and there must be an actual seisin in deed, a seisin in law not being sufficient, *Co. Litt.* 29, a. But it is immaterial at what time the issue is born, whether before or after the lands vest in the wife, or whether the issue be then alive or dead, *Co. Litt.* 30, a; and the possession of a tenant for years will be the possession of the wife, so as to give a title to the curtesy before receipt of rent. Of an advowson, or rent, of which actual seisin cannot be obtained, there will be curtesy, although the wife die before avoidance or receipt, *Co. Litt.* 29, a. By custom of gavelkind, the husband, if he survives his wife, is entitled to a moiety, whether he has issue or not, so long as he remains unmarried. Tenant by curtesy is subject to action for waste, and to forfeiture: and his concurrence, if seised of the freehold in possession, was requisite in making a tenant to the *præcipe*, as before remarked in the case of dower.

De Grey v. Richardson,
3 *Atk.* 469.

Robinson's Gavelkind,
136.

[In *Barker v. Barker*, the devise was to *A.* and her heirs; 2 *Sim.* 249. but if she died leaving issue, then to such issue, and their heirs. *A.* died leaving issue: and it was held that the husband of *A.* was not entitled to curtesy, as the children took by purchase, and the wife had not such an estate as could descend upon them.]

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

Litt. c. 3, s. 32 *Mr. Watkins* seems to have omitted all mention of this
 —34. 2 *Bl.* estate. It arises when lands are limited in special tail, and
Comm. 124. one of the parties from whom the issue are to proceed dies
 4 *Comyn's Dig.* without issue; as if lands are limited to a man and woman,
 38. 20 *Fin. Ab.* and the heirs of their two bodies, and one of them dies
 171. 2 *Bac. Ab.* without issue, the survivor is tenant in tail after possibility of
 554. 1 *Cruise's* issue extinct: so if lands are limited to a man, and the heirs
Dig. 134, 4th of his body by his then wife, and she die without issue, the
ed. husband is tenant in tail after possibility of issue extinct;
Litt. s. 32 and and this estate may exist in remainder; and it will arise
 33. if there be issue born, and the issue die without issue. The
Lewis Bowles's estate must be created by the act of God, and not by limita-
case, 11 Co. 84. tion of the party. And so, if lands are given to a man and
Litt. s. 32. his wife, and the heirs of their two bodies, and afterwards
Co. Litt. 28, a. they are divorced, *causâ consanguinitatis*, or *affinitatis*, their
 estate of inheritance is turned to a joint estate for life: but
 because their estate is altered by their own act, and not by
 the act of God, they are not tenants in tail after possibility of
Co. Litt. ibid. issue extinct, but merely tenants for life. So far as respects
 alienation, this tenant is reduced to an estate for life; for he
 has no power of barring the remainders or reversion on his
 estate. But he has several privileges which a mere tenant
 for life has not, the principal of which is, that he is dis-
 punishable for waste: but, nevertheless, it is said in *Herlakenden's*
 case, 4 *Co. 63*, that if he fell the trees the lessor shall have
 them, for he has not an absolute interest in them. There
 seems to be no decision to support this doctrine; and it is
 difficult to conceive it to be law, or to understand why this
 tenant is to be in a worse situation than tenant for life,

without impeachment of waste, when the law professes to consider his interest as better than that of tenant for life ; and it is denied to be law by *Lord Coke*, in 1 *Roll. Rep.* 184.

The privileges of this tenant are enjoyed in respect of the privity of estate and inheritance once in him ; and, therefore, if he assign his estate to another, the privity is gone, and his grantee will be mere tenant *pour autre vie*, and it should seem *Co. Litt.* 28, a. be punishable for waste. *Lord Coke* mentions four qualities of this estate, in which it is similar to that of mere tenant for life :—1st, It is liable to forfeiture ; 2dly, It will merge in an estate in fee or in tail ; 3dly, He in reversion or in remainder shall be received upon his default : and 4thly, An exchange between him and mere tenant for life is good. *Ibid.*

CHAP. VIII.

OF AN ESTATE TAIL.

2 *Bl. Comm.*
 110. *Litt. b.* 1,
 c. 2. *Wright's*
Ten. 185.
Sulliv. Lect.
 121.
Watk. No.
 lxxix. to *Gillb.*
Ten. 418, and
 1 *Watk. Cop.*
 ch. 4, p. 147.
 4 *Com. Dig.* 6.
 10 *Vin. Ab.*
 245, and 20 *Ib.*
 163. 2 *Bac.*
Ab. 538.
 1 *Cruise's Dig.*
 66, 4th ed.

WHEN an estate is limited to a person and *his descendants*, it is called an *estate tail*, as to a man *or* woman, or to a man *and* woman,* and the heirs† of *his, her, or their body or bodies*.

If it be to a man *or* woman, and the heirs of his or her body, it is an estate in tail *general*, as any heir of his or her body may inherit: but if it be to Thomas and the heirs of his body *by his wife Jane*, or to Jane and the heirs of her body *by her husband Thomas*, or to Thomas *and* Jane

* By this is to be understood a man and woman between whom in contemplation of law issue may be had: for if an estate be limited to a brother and sister, (for example), and the heirs of their bodies, this will give them a joint estate for life, with several inheritances in tail as tenants in common. *Fearne's Cont. Rem.* 8th ed. 36, 37.

† [In a deed technical words of limitation are indispensable, though not so in a will; thus a limitation in a deed to *A.* and his issue, only gives a life estate to *A.*; while a devise in similar words would confer an estate tail, *Co. Litt.* 20, b. *Wheeler v. Duke*, 1 *Crom. & Mec.* 210.]

and the heirs of *their bodies*, it is an estate in *special* tail; and so also if it be to the heirs *male* of the body of *A. B.* As, in the first case, no heirs of the body of Thomas can inherit but those who are born of Jane; nor, in the second, any heirs of the body of Jane by any other husband than Thomas; nor, in the third, any heir of the body of Thomas who is not also heir of the body of Jane, nor of Jane who is not also the heir of the body of Thomas; or in other terms, no heir of the body of Thomas, by any other wife, nor of Jane by any other husband, shall succeed.

Hence, if it be wished to settle lands so that the entail may not be cut off by the parents, it may sometimes be necessary to limit an estate for life to one parent, and the inheritance to the heirs of the body of the other, as the entail would then be in neither;* the first taking only for life, and the other not taking at all;

* The limitation to the heirs of the body would, in this case be contingent: and [previously to the late stat. 7 & 8 *Vict. c. 76*, might have been] destroyed by the tortious act of the tenant for life, if there were no limitation to preserve contingent remainders: and even if there were, it might fail of effect, in case the parent having the life estate should die before the parent to whose heirs the estate is limited, as there would, after the decease of the tenant for life, be no estate of freehold to support the contingent remainder, unless the limitation to the trustees were extended to meet that event. It is a mode of limitation which can never be recommended.

[*Hasker v. Sutton*, 1 *Bing.* 500.
Doe v. Howell, 10 *Bar. & Cres.* 191.]

but the heirs being in by purchase. Or if the estate be the husband's, to limit to him for life, with remainder to the wife in tail, as he, being tenant for life only, cannot dock the entail, and the wife is prevented from doing so by the statute of *Hen. 7, c. 20*.*

1 *Co.* 104.
Watk. Desc.
 157. 1 *Harg.*
Law Tr. 485.
 550.

But as it is a rule,† that “if the ancestor,

* But as the husband and wife may *together* bar the entail this is not always an effectual mode of prevention.—Note by *Mr. Watkins*.

This mode of limitation should never be resorted to, unless it is wished to give the parents jointly a power of disposition over the estate; and even in such a case, a joint power of appointment is more simple: [previously to the statute 3 & 4 *W.* 4, *c.* 74, such power prevented the expense of a fine or recovery which would otherwise have been needful to bar the entail; and now since the above statute it supersedes the necessity of adopting those forms which the act annexes to assurances substituted, in pursuance of its provisions, for fine or recovery.]

Rule in *Shelley's* case.

† This is the well known rule in *Shelley's* case; so called, not because the rule was first propounded in that case, but because the rule determined the case. From an ignorance of the principle of this rule, more legal errors and greater mischiefs have probably arisen, than from the misapplication of any other rule in law. As *Mr. Watkins* has treated it very briefly, it becomes necessary for us to give some further explanation on the subject. The rule has its origin in feudal principles; and was most probably established to prevent injury to the lord, by loss of wardship, if the heirs could have been made to take by way of purchase, instead of by descent. The rule is, that wherever the ancestor takes an estate of freehold, and an immediate remainder is limited thereon in the

by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his or her heirs in fee or in tail, the words *the heirs* are words of limitation, and not words of purchase," care must be taken, if it be in-

same conveyance to his heirs general, or heirs special, the remainder so limited is immediately executed in possession, in the ancestor so taking the freehold ; and therefore, is not contingent or in abeyance. And also, wherever the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards, in the same gift or conveyance, a limitation to his right heirs or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, &c., this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance. And even if the remainder cannot by possibility vest in the lifetime of the ancestor, as to *A.* and *B.*, and the heirs of him who shall die first ; or if the remainder be limited on a contingency, which contingency does not happen in the ancestor's lifetime, nevertheless, the heirs will take by descent.

The general principles which seem to govern the application of the rule are as follow ; *First*, both the limitations must be created by the same instrument, or by that which is tantamount thereto, *viz.* the estate of freehold by one instrument, and the remainder to the heirs by an exercise of a power of appointment contained in that instrument. *Secondly*, both estates must be legal, or both equitable. On this a doubt has been entertained, where the freehold in the ancestor is legal, and the remainder in the heirs equitable : but it should seem the estates will not, in such case, coalesce. [7 *T. R.* 342.] *Thirdly*, the rule will operate, although the estate of freehold be made without impeachment of waste, or with powers of jointuring or leasing, or there be an immediate limitation to

tended that the entail shall not vest in the parents, to limit the estates so as not to be capable of uniting; as to the parent for *years*, as for ninety-nine years if he so long live, which will only give him a *chattel interest* that cannot coalesce with the estate limited to his heirs, which is a

trustees to preserve contingent remainders. *Fourthly*, it will operate even if words of limitation be engrafted on the remainder to the heirs, not being inconsistent with the nature of the descent pointed out by the first words; or if the limitation be to heirs special, with general words of inheritance engrafted thereon. *Fifthly*, if there are words of limitation engrafted on the remainder to the heirs, inconsistent with the nature of the descent pointed out, as to *A.* for life with remainder to his heirs, and their heirs female of their bodies, 1 *Rep.* 95, b.; or there be explanatory words added thereto, as “to *B.* and the heirs of his body (that is to say) to his first, second, and other sons,” or “to *A.* and the heirs male of her body begotten, or to be begotten, as tenants in common, and not as joint tenants; and if such issue should die before he, she, or they, should attain twenty-one, then to *B.* in fee,” *Doe v. Goff*, 11 *East*, 668, or “to *A.* and after her decease, to the heirs of her body, share and share alike, if more than one;” the heirs will take as purchasers. *Sixthly*, if the word “heir” be used in the singular number, without any words of limitation thereon, the rule will take effect, unless, as in *White v. Collins*, *Com. Rep.* 289, [*Douglas v. Congreve*, 4 *Bing. N. S.* 1,] the limitation to the heir be for life: but it seems if the limitation to the heir be in the singular number, with words of limitation thereon engrafted, although consistent with the nature of the descent pointed out, yet the word *heir* has been deemed a word of purchase. *Seventhly*, the rule applies as well to trusts executed as to legal estates. But, *Lastly*, in trusts executory

Lowe v. Davies,
2 *Ld. Raym.*
1561.
Gretton v.
Howard,
6 *Taunt.* 94.
1 *Mer.* 448.
Overruled by
Jesson v.
Wright, 2
Bligh, 2, 58,
and see *Wilcox*
v. Bellaers,
Hayes Inq. 1.

[See 1 *Myl. &*
Cr. 411.]

freehold :* or to give an *equitable* estate only to the parent, and a *legal* one to the heirs ; for estates must be of the same nature to be capable of uniting, as both equitable, or both legal : †

the rule is relaxed ; and the Court of Chancery will direct a settlement on the issue, as purchasers, if such be the evident intent of the parties. This latter observation applies chiefly to the case of marriage articles. See *Trevor v. Trevor*, 1 *Eq. Ca. Ab.* 387. 1 *Peere Wms.* 622. *Jones v. Laughten*, 1 *Eq. Ca. Ab.* 392. *Cussack v. Cussack*, 2 *Bro. P. C.* 116, 8vo. ed.

These are the general principles which govern the application of the rule ; they are drawn from *Mr. Fearn's* elaborate essay on *Contingent Remainders*, which we recommend to the student's careful and patient perusal.

[A rule of construction in some respects analogous to the rule in *Shelley's* case, is applicable to dispositions of personalty in deeds (15 *Ves.* 537, 2 *Keene*, 646, 3 *Myl. & K.* 197,) and in wills, 3 *Russ.* 467, 1 *Keene*, 325, 1 *Myl. & K.* 470. *Earl of Verulam v. Bathurst*, 7 *Jur.* 295.]

* [The limitation to the heirs was until the recent statute 7 & 8 *Vict. c.* 76, a contingent remainder, and a limitation to trustees during the life of the parent was necessary to support it ; but the law is now otherwise, for by the 8th section of that act, it is enacted, that no estate in land shall be created by way of contingent remainder, but shall take effect as an executory estate having the properties of an executory devise ; and also that contingent remainders existing previously to the act, shall not be destroyed by the destruction or merger of any preceding estate, or its determination by any other means than by the natural effluxion of time of such preceding estate, or some event on which it was in its creation to determine. See Chapter on Remainders, *infra*.]

† This has been referred to in the preceding note on the

or to confine the particular estate to *one* parent, and limit the remainder to the heirs of the body of *both*.* And care must also be taken that *the whole of the particular estate be disposed of*, lest any estate of freehold be capable of *resulting to the ancestor to whose heirs the estate is limited*.†

rule in *Shelley's* case: the only remaining point on that subject to be noticed, is the instance of the estate of freehold being legal, and in trust for other persons, with a legal beneficial remainder to the heirs of the first taker. On this *Mr. Fearne* entertained doubts. But *Mr. Butler* seems to think that, as the Courts of law cannot notice the trust, the estates must coalesce. *Fearne's Cont. Rem.* 8th ed. 35. And in this opinion we concur.

* The remainder will be contingent, and the heirs take as purchasers, *Lane v. Pannell*, 1 Roll. Rep. 238. *Frogmorton v. Wharrey*, 3 Wils. 125.

† A use will not result contrary to the intent of the conveyance, as if a use be expressly granted away during the grantor's life, *Tippin v. Cosin*, Carth. 272, or if an estate for years be limited to him, as in *Adams v. Savage*, 2 Salk. 679. *Rawley v. Holland*, Vin. Ab. Vol. XXII. p. 189. *Else v. Osborne*, 1 Peere Wms. 387. But a use will result on a limitation, which may, by possibility, determine in the grantee's lifetime, as by forfeiture of a life estate, *Wills v. Palmer*, 5 Burr. 2615; and also, if no estate whatever be limited during the grantor's life, *Pibus v. Mitford*, 1 Vent. 372; or, if there be a preceding limitation for years (not being to his use, or for his benefit,) *Penhay v. Hurrell*, 2 Vern. 370. The application of the doctrine to the point in the text is, that this resulting use will, under the rule in *Shelley's* case (which has been already explained), unite with the subsequent limitation to the heirs of the body of the grantor, so as to give him an estate tail.

But the best and most usual mode is to limit to the parent or parents for life, with remainder, not to the *heirs* of his, her, or their body or bodies, but to the *son* or *sons* (or *children*), and the heirs of his, her, or their body or bodies; so that the son, or sons, or children, shall take as *purchasers*, as persons *particularly and expressly designated*, and *not as the heir or heirs* of the parent or parents. [But if in a settlement made before the 1st of *January*, 1845, the remainders had been to children unborn, such remainders must necessarily have been *contingent* until the children came *in esse*, and, consequently, must have been subject to destruction, or to being defeated by the parents ;*] and hence the utility of

Son and children may mean issue in a will. *Mellish v. Mellish*, 2 *Barn. & Cress.* 533. *Wollen v. Andrews*, 2 *Bing.* 126.

2 *Bl. Comm.* 171. 1 *Atk.* 581. *Hopkins* alias *Dare v. Hopkins*, *Bull.* add. n. to *Co. Litt.* 271, b. & n. (2) to 265, a. and 290, b. (s. 111). 1 *Fearne, Contingent Rem.* 281, 8th ed.

* Before the statute 7 & 8 *Vict. c.* 76 (s. 8), which came into operation on the above day, contingent remainders must have been supported by a preceding estate of freehold, or, by an immediate preceding right of entry for an estate of freehold, and hence arose the doctrine of the destruction of contingent remainders by tenant for life. For if tenant for life, on whose particular estate contingent remainders were depending, commit an act of forfeiture, his estate was destroyed; and all contingent remainders depending on his estate were consequently defeated. But as it was held that an immediate right of entry in some third person for an estate of freehold, would support the contingent remainders, a limitation was introduced to trustees during the life of the tenant for life, in trust in case of forfeiture to enter and revest the estates displaced by the act of forfeiture: and by this right of entry in the trustees, the contingent remainders were supported; but the law has now become materially altered in this respect as noticed in a preceding page, 113, note.

Fearne, C. R. 286, 8th ed.

appointing trustees for preserving them. The most common mode of limiting these remainders to the issue, is to *the first and other sons successively* : but this mode is sometimes objectionable, as it renders the eldest son independent of his parents ; and it may, therefore, be advisable to limit the estate *to such son of the marriage as the parents, or the survivor of them, shall*, by deed or will, *appoint*, and to the heirs of his body ; and, in default of such appointment, to the first and other sons, &c. in the usual manner.*

* This proposition is open to observation. In great family settlements it is generally the intent of the parties to make a certain provision for the eldest son, independent of the parents, in which case no power of appointment amongst the children should be introduced. But if it be the wish to give the parents a control over the eldest son, this discretionary authority had better, in most cases, be confined to both the parents jointly, and not be extended to the survivor ; and at any rate, if the power is to be given, it should not be confined to an appointment in tail, but should enable the parents to appoint to the sons any estate they may think proper, which by an appointment in fee, [may supersede the necessity of resorting to the forms of conveyance substituted by the 3 & 4 W. 4, c. 74, for fines and recoveries.]

In limiting an estate in strict settlement, the parents should be questioned whether it is their wish to give preference to their own daughters, or to the daughters of their sons. If the first, then the limitations may be to the first and other sons successively in tail male, with remainder to the daughters of the marriage as tenants in common in tail male, with cross-remainders, with remainder to the sons successively in tail general, with remainder to the daughters in tail general, &c. But if the latter, then to the first and other sons in tail male, &c., with remainder to the sons in tail general, &c., with

An estate tail cannot be transferred to another : but as the tenant in tail has a fee (though restricted) in him, he may convey a base fee to another by lease and release, bargain and sale enrolled, or [by a deed of disposition under the statute 3 & 4 W. 4, c. 74, without the consent of the protector, as he might before that statute by fine ;] that is, if he make such conveyance to A. and his heirs, A. and his heirs shall have a fee simple qualified, that is, so long as the issue of the tenant in tail continue.* And if the

No. 1 to Co. Litt. 331, a. and the books there cited. Of *Discontinuance*, see n. (1) to Co. Litt. 326, b and n. (1)(2) to 327, a. 3 Bl. Comm. 171. 191. Litt. b. 3, c. 11, and Co. Litt. 325. Gilb. Ten. 107. 5 Durnf. & East, 104. *Roe d. Crow v. Buldwere*, and *Martin d. Tregonwell v. Strachan*, in notis.

remainder to the daughters in tail general, &c. It will be found that the first is generally their wish. But in many settlements, the daughters of sons have priority.

* In the case of *Took v. Glascock*, 1 Saund. 260, it was held, that if tenant in tail by bargain and sale conveyed the lands to another and his heirs, the bargainee had but an estate descendible for the life of tenant in tail, and that his heir should take as special occupant. In *Machell v. Clarke*, 2 Lord Raymond, 778, Lord Holt denied the case of *Took v. Glascock* to be law ; and it was held, that if tenant in tail convey the lands entailed by bargain and sale, lease and release, or covenant to stand seised, to the use of another in fee, and die, a base fee passes by the conveyance, and the estate continues until it be avoided by the issue in tail by entry ; and, therefore, the widow of the grantee will have dower, and the grantee is not punishable for waste ; and his alienation by feoffment, and other conveyance, is no forfeiture. It was also decided in *Machell v. Clarke*, that if tenant in tail bargained and sold, or covenanted to stand seised to the use of one for life, with remainder to another in fee, the remainder was good until entry : but that if he covenanted to stand seised to the use of himself for life, with remainder to another, the remainder is *ipso facto* void, because

enant in tail had also the immediate remainder or reversion in fee in himself, he might, [pre-

the issue have a right paramount to the title of the remainder. If tenant in tail by bargain and sale, lease and release, or covenant to stand seised, convey to the use of another in fee, and the bargainee is seised by virtue of such conveyance; a fine [with proclamations] afterwards levied by tenant in tail extinguished the estate tail, and confirmed the base fee, but did not discontinue the remainderman or reversioner; who might, therefore, enter on the failure of issue, and were not driven to the action of *formedon*, *Seymour's case*, 10 *Coke*, 96, which would have been the case, if the fine had been levied before the bargain and sale, or had been levied in pursuance of a covenant, in the conveyance of the estate, *Doe v. Whitehead*, 2 *Burr.* 704. If tenant in tail in *possession* conveyed by fine or feoffment, it operated as a discontinuance of the estate tail, and the remainderman or reversioner was driven to his *formedon*: but an actual entry was not necessary to avoid this fine [previous to the bringing of such action of *formedon*, as it was of an ejectment. This action must, however, have been brought within five years after the title accrued, 1 *Saund.* 261, note.] If the conveyance was by feoffment, the issue [could not enter on the death of tenant in tail, because it created a discontinuance, by which they were driven to their real action;] if it was by fine with proclamations, they were utterly barred by force of the statutes, 4 *H.* 7, *c.* 24, 32 *H.* 8, *c.* 36. But a fine at common law was not a bar, although, if levied by tenant in tail in possession, it discontinued the estate tail, and drove the issue to their *formedon*. And to be a bar, the proclamations need not be in the lifetime of the tenant in tail who levied the fine, 1 *Saund.* 258, 259. If tenant in tail created a base fee, and afterwards levied a fine to other uses, the fine operated to confirm the base fee, 8 *Term Rep.* 214. But in order to acquire the absolute fee, it was necessary, the graantee, &c. should concur in making a

Tolson v. Kaye,
3 *Brod. & Bing.*
217. 6 *J. B.*
Moore, 565.
Infra, Ch.
Grant, Fine.

viously to the above statute, have] conveyed an absolute fee to another, or gained an absolute fee in himself, by levying a fine; for the fine passed the reversion, which is an absolute fee, as well as the base fee; and when both fees are fixed in the same person, the base fee [previously to the above act] merged in the absolute one, so that the absolute or reversionary fee came into possession.*

tenant to the *præcipe* in a common recovery, which, when suffered, rendered the estate of the grantee indefeasible. And if tenant in tail by lease and release conveyed to the use of himself, for life, with remainders over, and afterwards suffered a common recovery to other uses, the recovery enured to the uses of the settlement.

[The preceding sentence, which is in conformity with a note of *Mr. Serjeant Williams*, to 1 *Saund.* p. 260, and the passage above which cites 8 *T. R.* 214, must be read with some qualification. The authority cited does not support the proposition deduced from it. In that case (*Doe v. Whichelo*) *A.*, the tenant in tail of a moiety of an estate, by lease and release conveyed it to his sister (the tenant in tail of the other moiety) in fee: the release contained a covenant from *A.* to levy a fine to enure to the use of his sister in fee. In the fine (which was not levied until after her death intestate) her heir at law was plaintiff, and *A.* the deforciant: *no other uses* were declared when the fine was so levied, nor at any time afterwards, 8 *T. R.* 212. The reader is referred to a note on a future page, in the chapter on Uses and Trusts, for some observations on conflicting declarations of uses.]

* With all the incumbrances created by any of the persons through whom it descended. When the reversion descended on the tenant in tail, a common recovery should have been suffered, for two reasons: First, it prevented the charges of his ancestors from taking effect; and, secondly, it precluded

5 *Cruise's Dig.*
214, ed. 4.
Symonds v.
Culmore,
4 *Mod.* 2.
Shelburn &
Biddulph,
6 *Bro. Parl.*
Cases, 356.
5 *Cru. Dig.* 383,
ed. 4.

Post, B. 2, c.
16. 5 *Cru. Dig.*
396, ed. 4.

But as the tenant in tail (while tenant in tail) might charge the reversion, and as the fine when levied brought the reversion into possession, it was frequently prudent, and, indeed, necessary, in order to gain a good title, to suffer a recovery : as a fine let in the charges of the tenant in tail, and a recovery gave a new fee, [letting in the charges only of the person suffering it, though not those of his ancestors.]*

the necessity of tracing the title of the fee to him, which was otherwise unavoidable, and often attended with expense and vexation ; for, as the base fee merged in the reversionary fee, it became essential to show the regular descent of the latter, on the tenant in tail. [The law, however, is now altered in reference to the instance noticed in the text. Fines and recoveries being abolished by the stat. 3 & 4 *W.* 4, c. 74, a tenant in tail in possession, whether the immediate reversion in fee be in himself, or there be remainders depending upon his estate tail, is now empowered, by the above act, to acquire an absolute fee by a deed of disposition executed in conformity with its requirements. The base fee (in the instance above noticed) by the 39th section of the act, becoming united, at or after the passing of the act, with the immediate reversion in fee, does not now merge in the latter, but is *ipso facto* enlarged into an absolute fee, thereby driving out the reversion ; the effect which a recovery before the act would have produced, if suffered by the tenant in tail.]

* In *Stapilton v. Stapilton*, 1 *Atk.* 8, *Lord Hardwicke* says, “ If tenant in tail confesses a judgment, or a statute, or enters into a bond, and afterwards suffers a recovery to bar the estate tail, it lets in the preceding judgment, &c., and it is as clear, if a tenant in tail make a lease, not warranted by

Hence, then, was a recovery suffered by the tenant in tail, in most cases, the best and most effectual bar:* and this should have been suffered with (at least) a *double* voucher, for if suffered with a *single one*, it only barred the estate of which the tenant in tail was actually seised at the time; but if with a double or treble voucher, it barred every other interest he might have in the premises, as will appear under the head of RECOVERY.

2 Bl. Com. 359.
Pig. 108, ch. 5.
5 Cru. Dig.
ch. 7, ed. 4.

5 Cru. Dig.
p. 375, ed. 4.

A tenant in tail in possession [might also before the above act,] in some instances, bar both his own issue and those in remainder, by annexing a *warranty* to his grant; as the warranty descended to his heirs, and, if accompanied with

See 2 Barr.
1072, &c.

2 Bl. Com. 303.
Gillb. Ten. 133.
and Watk. n.
liv. &c. p. 400,
&c.

the statute of the 32 H. 8, if he suffers a recovery, that lets in the lease, and makes it good: there are so many cases of this kind that it is not necessary for me to mention them."

* In some cases, indeed, a fine is a more effectual bar than a recovery; as the former is declared an estoppel or bar by the statute 32 H. 8, while it would be at least doubtful whether the issue would be estopped merely by the vouching of the ancestor. *Post*, B. 2, c. 15, and c. 16.—Note by *Mr. Watkins*.

Helps v. Hereford, 2 Barn. & Ald. 244.

There were cases in which a fine *must* have been resorted to, as by tenant in tail in remainder to bar his issue, if the tenant of the freehold would not, [or through mental incapacity could not,] concur in a recovery; and also, if an estate tail were limited on a contingency. [Under similar circumstances an assurance under the statute 3 & 4 W. 4, c. 74, may be resorted to by the tenant in tail to effectuate the same object.]

assets, barred his own issue, and without assets barred such of his heirs as might be in remainder or reversion. But the propriety of this mode depended upon much nice matter, and should [have been resorted] to with much caution; for should *no assets actually descend to the issue*, they were not barred, nor was the remainderman or reversioner, *unless he was also the heir of the warrantor*; for, unless he was *the heir* of the warrantor, he was not subject to the warranty.

The warranty descending on the issue was a *lineal* warranty, as the heir claimed *through the warrantor*; and lineal warranty was no bar without assets actually descending. But the warranty descending on those in remainder or reversion was *collateral*, as they did *not claim through the warrantor, but immediately from the donor*: and *collateral* warranty barred without assets.*

Warranty.

* The student must understand that the terms lineal and collateral, as applied to warranty, refer to the estate, and not to the person; that is, if he on whom the warranty descended could, by possibility, have claimed the land as heir to him who made the warranty, it was lineal; if not, it was collateral: so that collateral warranty might descend on a lineal heir, and lineal warranty on a collateral heir. Thus, in the instance put by *Littleton*, s. 704, if the son purchase lands in fee, and his father disseise him, and alien with warranty and die, this warranty is collateral, because the son claimed not the land as heir to his father. And, on the other hand, if a man be disseised, and the eldest son release the disseisor with warranty, and die without issue, and afterwards the father die, this is lineal warranty to the younger son;

[But now warranties of lands to bar estates tail and estates expectant thereon are abolished by the 14th section of the statute 3 & 4 W. 4, c. 74.]

And so established was the power of the tenant in tail to destroy the entail and alien, by fine or recovery, that no condition restrictive of such

1 Burr. 84, No (1) to Co. Litt. 379, b. Vide *infra*, B. 3, ch. 4, as to entails of the gift of the crown. 6 Geo. 4, c. 16, s. 65.

because he might, by possibility, convey title to the lands through his elder brother, *Litt. s. 707*. Warranties at the common law were of three sorts, namely, lineal, collateral, and commencing by disseisin: the latter warranty was no bar to the heir, and arose in the case of a disseisin with an intent to alien with warranty, and did not apply to the case of common disseisins. Lineal warranty, it should seem, could only imply an obligation to make recompense in case of eviction to the amount of assets descended; for, as the ancestor might have parted with the estate, there was no occasion for it to rebut the claim of the heir. The effect of collateral warranty, on the contrary, was to estop the legal claim of those in remainder or reversion, on the presumption, it should seem, that they had received an equivalent: hence the warranty of tenant for life effectually barred the remaindermen if the warranty descended on them as his heirs. But by the 4 & 5 Ann. c. 16, all warranties of tenant for life were rendered void, and all collateral warranties of any ancestor who had not an estate of inheritance in possession were also void against the heir; lineal warranties [until the recent statute 3 & 4 W. 4, c. 74,] remained as at common law, that is, they bound with assets. To apply the doctrine to estates tail, the collateral warranty of tenant in tail in possession was not avoided by the statute of Ann.; and, consequently, if a remainderman was his heir, he would be barred. As to the issue, it was held, they were protected by the statute *de donis*, and were only estopped by warranty

power was permitted to take effect.* [And the same rule, it is conceived, equally applies to any condition restraining the alienation of tenant in tail by deed, in conformity with the provisions of the statute 3 & 4 W. 4, c. 74, which, abolishing fines and recoveries, substitutes more simple modes of assurance.]

And note, that express power is given by statute to commissioners of bankrupt to convey lands entailed of the bankrupt, by bargain and sale enrolled.†

with assets; and the reversioner also, it should seem, was in like manner, protected by the same statute: see *Bole v. Horton, Vaughan*, 360: in all other instances, the doctrine of warranty appears to have been obsolete. An able review of the doctrine will be found in *Mr. Butler's* notes in *Co. Litt.* 373, b.

See *Fearne's*
Cont. Rem.
260, 8th ed.

* This must be understood of a fine within the statutes 4 H. 7, and 32 H. 8; that is, with proclamations; for a condition restraining alienation by discontinuance, such as by feoffment, or fine at common law, was valid, [previously to the statutes 3 & 4 W. 4, c. 74, s. 2, 14, and c. 27, s. 39, by which discontinuances are virtually abolished.]

† [Since the passage in the text was written, the Bankrupt Law has undergone various fluctuations. Previously to the 6 G. 4, c. 16, the conveyance by the commissioners must have been indented and enrolled in some of his Majesty's Courts of Record, within six months, and was a bar to all persons whom the bankrupt could have barred, by fine, recovery, or other means. The 6 G. 4, c. 16, which was passed to consolidate the law respecting bankruptcy, did not restrict the enrolling to six months. That act, in its turn,

[5 & 6 Vict.
c. 122.]

was repealed, so far as related to the conveyance of the bankrupt's real estate by the commissioners, by the 1 & 2 *W. 4, c. 56*: which latter act established the Court of Bankruptcy, and, by s. 26, enacted that the bankrupt's real estate shall without any conveyance vest in the assignees for the time being by virtue of their appointment. The statute 3 & 4 *W. 4, c. 74*, for abolishing fines and recoveries, repeals the 6 *G. 4, c. 16*, so far as relates to estates tail; and, to that extent also, repeals by s. 55, the 1 & 2 *W. 4, c. 56, s. 26*; and by s. 56, empowers any commissioner acting in any fiat, after the 31st December, 1833, by deed enrolled within six months after its execution, to dispose of the lands of the bankrupt tenant in tail to any purchaser. The 1 & 2 *W. 4, c. 56*, is still in force respecting the estates of which the bankrupt is seised in fee simple; and also with respect to those of which he is seised *in tail*, until they are conveyed by the commissioners; for all the bankrupt's real estate by s. 26 of the latter act is vested in the assignees; but the *commissioners* appear to be the proper parties to convey the bankrupt's estates tail under the 3 & 4 *W. 4, c. 74, s. 56*, and the *assignees* the proper parties to convey the bankrupt's estates in fee simple, under the 1 & 2 *W. 4, c. 56*. See 1 *Cru. Dig.* p. 88, note (*h*) Ed. 1835.]

[It was settled, by the case of *Jervis v. Tayleur*, 3 *Barn. & Ald.* 557, that the assignees under the statute 21 *Jac. 1, c. 19, s. 12*, of a bankrupt tenant in tail in remainder, expectant upon a previous life estate, only took by the assignment of the commissioners a base fee; that is, such an estate as the bankrupt himself, without the concurrence of the tenant for life, could convey, by fine with proclamations. The case above cited strikingly illustrates the point in question: there a joint commission was issued against the father, tenant for life, and the son, the tenant in tail next in remainder; it was contended, that as the father and son, by joining in a recovery, might have barred the remainders, and conveyed an absolute fee, so the assignment of the joint commissioners, upon the true construction of the Bankrupt

Act, which was to be construed liberally for the benefit of creditors, would pass an absolute fee to the assignees: but the Court of K. B. was of opinion that the power of the commissioners operated upon each estate separately, and that their assignment only conveyed the life estate of the father, and a base fee in remainder determinable upon the death of the son, and failure of his issue under the entail. See statute 3 & 4 W. 4, c. 74, ss. 56, 57, 58.]

[We may here remind the student that conveyances by a bankrupt *bonâ fide* to a purchaser, without notice made and executed before the issuing of any fiat, shall be valid, notwithstanding a prior act of bankruptcy, 2 & 3 Vict. c. 11, s. 12, and see Chapter on Gift, *in notis infra*.]

OBSERVATIONS ON THE STATUTE 3 & 4 *WILL.* 4,
c. 74,* AS IT APPLIES TO ESTATES TAIL AND
BASE FEES.

[As a suitable appendage to the preceding chapter, a brief summary is here introduced of those parts of the statute 3 & 4 *W.* 4, c. 74, which confer powers of disposition upon persons entitled to estates tail and base fees.

The assurance, which must be enrolled in Chancery within six calendar months from its execution (s. 41) may be, by feoffment, lease and release, bargain and sale, grant or covenant to stand seised, according to the circumstances of the estate, and the object of the parties, but not by executory contract or will (ss. 15, 40.) The estate tail may be barred whether legal or equitable, in possession, remainder, or contingency (s. 15); and the conveyance may be either with or without the consent of the person called by the act "the protector;" but where there is a protector, his consenting or not will materially affect the operation of the deed of disposition, as it regards the remainders expectant upon the estate tail in reference to which his concurrence is required.

Mode of as-
surance.

What estates
tail barrable.

The office of the protector is to consent, and not to convey.

Office of pro-
tector.

* [The statute which is the subject of the following annotation was framed, by *Mr. Brodie*, and it is due to this eminent conveyancing counsel to say, that the statute books of the united kingdom do not furnish a more masterly specimen of remedial legislation. Displacing an artificial system of assurance involved in abstruse learning and useless technicality, it supplies a simple and effective substitute; and the analytical arrangement of the whole is in perfect accordance with the clearness and accuracy of the enactments in detail.]

Where the deed does not appoint any protector, the first tenant for life or years determinable on life, will, in general be the protector; and that, notwithstanding the partial or total alienation of his estate (*s.* 22); but subject to the exceptions in *ss.* 29 and 30: And where there are several successive life estates, when the first tenant for life for the time being dies, the next in succession will be the protector (*s.* 22). Dowresses, lessees at a rent, bare trustees (except under *s.* 31) heirs, executors, and assigns, in respect of any prior estate which they hold as such bare trustee, &c. are excluded from the office (*ss.* 26, 27): And the person entitled to the prior estate (but for the last exception) will be the protector. Thus under a limitation, after the passing of the act, to *A.* for the life of *B.* in trust for *C.*, remainder to *D.* in tail, *C.* will be the protector (*ss.* 28, 31); but a similar limitation in a deed executed before the passing of the act would by *s.* 31 confer the office of protector on *A.* Where a prior estate is settled to the separate use of a married woman, she will be the sole protector; but if the prior estate of the married woman be not so settled, she and her husband will, as one owner, be deemed the protector (*s.* 24):* where two or three persons are owners, under a settlement, to such a prior estate as would confer the privilege of protector, then each shall be protector of his proportion (*s.* 23). When the protector is a lunatic,† the Lord Chancellor or the Lord Keeper or Lords Commissioners of the Great Seal, &c., will be the protectors, and in case of treason, felony,* or infancy of the protector, or it cannot be known whether he be living or dead, or where the settlor excludes from the office the person who would otherwise be protector, without naming a substitute (as under *s.* 32 he is empowered to do) in all these cases the Court of Chancery is protector (*s.* 33). It should

* *In Re Wainwright*, 1 *Philips*, 258; 11 *Sim.* 352.

† 3 *Myl. & K.* 245, 247, 250. 2 *Myl. & Cr.* 112. When the lunatic is tenant in tail in possession, the Lord Chancellor is not protector. *Wood in Re*, 3 *Myl. & Cr.* 366.

also be noticed that the protector is not subject to any control, in the exercise of his discretionary power of giving or withholding his consent (*s.* 36). Prior estates conferring the office of protector must be limited under the same deed (*s.* 22).

Having noticed briefly the office of protector, a few observations are offered on the power of disposition conferred upon tenants in tail and persons entitled to base fees.

Power of disposition.

A tenant in tail in possession, may by deed in conformity with the act, convey away the fee simple absolute, or any less estate (*ss.* 15, 21) or otherwise modify or dispose of the estate, in the same manner as if he were seised in fee (*s.* 40), except such tenant in tail were a woman seised *ex provisione viri*, under 11 *H.* 7, *c.* 20, by virtue of a settlement made before the passing of the act (*ss.* 16, 17); and except as to reversions in the Crown, under 34 and 35 *H.* 8, *c.* 20 (*s.* 18).^{*} A tenant in tail with remainders over, where there is a protector, cannot bar the remainders over expectant upon his estate tail, without the consent of such protector, such protector may concur either in the deed of disposition, or by a separate deed (*s.* 42); but without such consent, the tenant in tail may acquire or convey a base fee co-extensive with the continuance of issue under the entail, thereby barring such issue; as before the act he might have done by a fine with proclamations.

By tenant in tail in possession.

Tenant in tail when there is a protector.

If the estate tail be in remainder, the person entitled, may with the concurrence of the protector, bar all remainders and other estates and interests, expectant upon his own estate tail; but, of course, leaving unaffected estates prior thereto.

Tenant in tail in remainder.

A person having created a base fee by a deed of disposition under the act, may (but with the consent of the protector, if there be one) by a subsequent deed, enrolled according to

Base fees.

^{*} A reversion in the Crown not within the 34 & 35 *H.* 8, *c.* 20, is barred by the 3 & 4 *W.* 4, *c.* 74. See sect. 15, and *Duke of Grafton v. London and Birmingham Railway Company*, 5 *Bing. N. S.* 27.

the act, bar the remainders over (*ss.* 1, 19) so a subsequent disposition, enlarging a base fee into an absolute fee, will have the effect of confirming voidable estates in favour of purchasers for value, but not against purchasers for value without notice (*s.* 38). Base fees becoming united with the reversion in fee are enlarged into an absolute fee, to the exclusion of the reversion in fee (*s.* 39).

Copyholds.

The preceding clauses of the act relating to freeholds are made applicable to copyhold lands, so far as the different tenures will admit; except that a disposition of copyhold lands by tenant in tail, if entitled at law, shall be by surrender; but if entitled only in equity, either by surrender or deed, as provided by *ss.* 50—54, inclusive.

Protector, as
to Copyholds.

If the consent of the protector of a settlement of copyhold be given by deed, the deed of consent must be produced to the lord, his steward, or his deputy, and an acknowledgment from the lord, steward, or deputy of such production must be indorsed on the deed; and the deed with the indorsement thereon must be entered on the Court rolls; and a memorandum of such entry must also be indorsed on the deed, and signed by the lord, steward, or deputy (*s.* 51.) If the consent of the protector be not given by deed, then it must be given by the protector to the person taking the surrender; and, if the surrender be made out of Court, a memorandum must be made of such consent signed by the protector; and such memorandum must be entered on the Court rolls. If the surrender be made in Court, the lord, steward, or deputy must cause an entry of such surrender, stating that such consent was given, to be made on the Court rolls (*s.* 52.)

A tenant in tail of copyhold lands, if he have merely an estate in equity, may, by deed dispose of them as he might under the act dispose of freehold lands; the deed must be entered on the Court rolls, and if there be a protector, and he gives his consent by a separate deed, it must be executed on or before the day of the execution of the deed of disposition; and such deed of consent must be entered on the Court rolls, and a memorandum of such entry must be signed by the lord

steward or deputy, (s. 53 :) and being then entered on the Court rolls, other inrolment of the deed will not be necessary (s. 54.)

The clauses 55 to 69 inclusive, relate to the estates tail and base fees vested in bankrupts, and will require brief notice. Bankrupts
tenants in tail.

The first clause repeals the statute 6 G. 4, c. 16, s. 65, relating to estates tail of bankrupts, but not extending to lands of a person adjudged a bankrupt on or before the 31st day of December, 1833.

Section 56 empowers the commissioner, acting under a fiat after the above day, absolutely to dispose of the lands of any bankrupt, actual tenant in tail, to a purchaser, and for as large an estate therein as the bankrupt himself could have conveyed by disposition in conformity with the act ; providing, that if there shall be a protector not consenting, the disposition of the commissioner shall pass as large an estate, as the bankrupt, without such consent, could himself have conveyed, had he not become bankrupt. A similar power is given by s. 57, to the commissioner to convey a base fee vested in the bankrupt ; and by the following s. 58, the provisions of the act respecting the consent of the protector are extended to cases of bankruptcy, except so far as varied by the following (s. 59,) which provides that the deed of disposition of freehold by the commissioner must be inrolled in Chancery within six calendar months after its execution ; and a disposition of copyhold must be entered on the Court rolls ; and where there is a protector, and his consent given by a distinct deed, it must be executed on or before the execution of the deed of disposition ; and both must be entered on the Court rolls : and a memorandum of such entry on the Court rolls must be indorsed on the deeds signed by the lord, his steward or deputy. Protector, in
case of bank-
ruptcy.

If the disposition of the commissioners, being made without the consent of the protector, conveys only a base fee to the purchaser, and if, during the continuance of the base fee, Base fees.

there ceases to be a protector, the base fee thereupon becomes enlarged to as large an estate as the commissioner could have originally conveyed, had there been no protector (*s. 60.*)

A similar provision is contained in *s. 61*, for enlarging base fees vested in the bankrupt. And *s. 62*, enables the commissioner to confirm voidable estates created by the bankrupt in favour of purchasers for valuable consideration, but not against a purchaser for valuable consideration without notice. Any acts of the bankrupt, void as against assignees, are rendered void as against any disposition by the commissioner, under the act (*s. 63.*) Subject to the powers given to the commissioner and to the estate in the assignees, and those claiming under them, the 64th sect. saves to the bankrupt the right of exercising all subordinate powers of disposition, in the same manner as if he had not been bankrupt. In certain cases the 65th sect. continues to the commissioners the power of disposition over the entailed lands of the bankrupt, notwithstanding his death.

By the 66th sect. the disposition by the commissioners of the copyhold lands of which the bankrupt was not merely entitled in equity is made to operate in the same manner as a surrender; and the purchaser is thereupon entitled to an admission, as if they had been surrendered to him in the usual manner, the usual fines and fees being paid. The 67th clause gives enlarged powers to the assignees for the recovery of the rents of the bankrupt's lands, and for enforcing covenants. The two following clauses 68 and 69, extend the provisions of the act to the bankrupt's land in Ireland, but the subsequent act of 4 & 5 *W. 4, c. 92*, renders further notice of them in this place unnecessary.

Entailed
money.

Sections 70, 71, 72, relate to entailed money. By the first of these, the stat. 7 *G. 4, c. 45*, is repealed, except as to proceedings commenced before 1st *January*, 1834, and without reviving stat. 39 & 40 *G. 3, c. 56*. By the succeeding section, the previous powers of disposition are, with certain variations, extended to those who may be considered *quasi* tenants in

tail of money to be produced by sale of lands of any tenure directed to be sold,* or to be reinvested in land, or of money to be laid out in the purchase of land. The 72nd sect. extends the preceding provision to lands in Ireland now re-enacted in the Irish act. The subsequent ss. 73 to 76, relate to the enrolment of deeds of disposition, and the entry of such deeds on the Court rolls in case of copyhold.

The 4 & 5 W. 4, c. 92, for abolishing fines and recoveries in Ireland is, with a few omissions and alterations, a copy of the English act of the 3 & 4 W. 4, c. 74: the clauses relating to lands of the tenure of ancient demesne (ss. 4, 5, 6,) and copyholds, (ss. 50, 54, 66, 76, 90,) are of course omitted as inapplicable to Ireland. The 22nd section is an important enactment, empowering persons (except expectant heirs of persons living,) to dispose of contingent estates and interests in lands by any assurance, whether deed, will, or other instrument, by which they may dispose of vested estates in possession. Contingent and executory interests, called possibilities, might, before the act, have been barred by fine by estoppel; and if coupled with an interest, might have been assigned in equity; but this clause confers a much more extended power of disposition; for the words of the section, see Chapter on Possibilities, *infra*. In the glossary clause, (s. 1,) the definition of the word "Estate" is extended to interests, charges, rights, and titles, &c., whether present or vested, future or contingent.]

4 & 5 W. 4.
c. 92, abolish-
ing fines and
recoveries in
Ireland.

* 3 *Myl.* & *K.* 249.

PRINCIPLES
OF
CONVEYANCING;

DESIGNED FOR
THE USE OF STUDENTS:
WITH
AN INTRODUCTION
ON THE STUDY OF THAT BRANCH OF LAW.

BY CHARLES WATKINS,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

PART II.
WITH ANNOTATIONS BY
THOMAS COVENTRY, Esq.
BARRISTER AT LAW.

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HENRY HOPLEY WHITE, Esq.,
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

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PRINCIPLES
OF
CONVEYANCING,
&c. &c.

CHAP. IX.

OF AN ESTATE IN FEE SIMPLE.

AN estate in fee simple is either *absolute, or qualified, or base*.* An estate in fee *absolute*

2 *Bl. Comm.*
104.
Litt. b., c. 1.
Wright, Ten.
146.
Prest. Est.
ch. 2.

* For all practical purposes the student may consider estates in fee as divided into—1. Estates in fee simple.—
2. Estates in base fee.

The *first* estate includes every other, and confers on the owner the entire and absolute dominion over the property. He can create every other estate out of it, and every other estate [except an estate tail] will merge in it. The properties of this estate are,—

Wiscot's case,
2 *Rep.* 60.

1. An unlimited power of alienation by deed or will.
2. An uncontrollable power in the commission of waste.
3. Liability to dower and curtesy.
4. Liability to [debts by specialty and simple contract.]

1 *W. 4, c. 47,*
and 3 & 4 *Ib.*
c. 104.

is an estate limited to a person and his heirs, general or indefinite. It is not confined to any

Infra, ch. In-
heritance.

2 *Bl. Com.* 72.
244.
54 *Geo.* 3, c.
145. *Co. Litt.*
499, b. 41, a.
3 *Prest. Abs.*
392. 2 *Watk.*
Cop. 364,
4th ed.

5. Descent to heirs general, according to the [old] canons of inheritance, [in case of deaths happening before the 1st Jan. 1834, and in case of descents taking place on the death of persons dying upon or after that day, according to the law of inheritance, as now altered by statute 3 & 4 *W.* 4, c. 106.]

6. Escheat* to the lord of the manor for want of heirs. And,

7. Forfeiture for treason, murder, and felony. *Treason*—to the king absolutely. *Murder*—to the king for a year, day, and waste, and afterwards to the lord of the manor absolutely. *Other felonies*—to the king for a year, day, and waste, and afterwards the rents and profits belong to the lord of the manor as *bona felonum* for the residue of the felon's life, the legal estate being still in him. On his death the estate descends to his heir.

10 *Co.* 95.
Co. Litt. 332, a.
2 *Ld. Raym.*
778. *Gilb. Ten.*
121.

Supra, p. 117.

The *second* estate arose where a tenant in tail with remainder to a stranger aliened in fee, either by fine [before the statutes 3 & 4 *W.* 4, c. 74, and 4 & 5 *W.* 4, c. 92,] feoffment, or any other species of assurance, [not being a common recovery,] the alienee had a *base fee*, that is, a fee simple determinable on the [death of the tenant in tail, and] failure of the issue under the entail. [A base fee may still be created by any assurance of the tenant in tail, not being such a disposition under the above act, as would bar not only the issue, but all estates in remainder dependent on the estate of the tenant in tail: such, for instance, would be a conveyance by tenant in tail, (not having the immediate

* [In reference to the escheat and forfeiture of real and personal estate vested in persons as trustees or mortgagees, see stat. 4 & 5 *W.* 4, c. 23, 1 & 2 *Vict.* c. 69.]

particular line or species of heirs, but is limited to the heirs generally; and it is the highest estate which the law acknowledges in a subject.

remainder or reversion in fee,) without the consent of the protector, sec s. 34.] If the tenant in tail was in possession, and [before the late act] levied, the fine with proclamations, it was a discontinuance, and not only barred the issue, but divested the estate in remainder: by the discontinuance of the tenant in tail, the remainderman was driven to his remedy by *formedon*, in order to regain the seisin or possession of the estate. The issue being barred, the alienee held in fee until the death of the tenant in tail, and a failure of issue under the entail, on which event the remainder commenced in right.] If the tenant in tail aliened by any species of assurance which did not bar the issue, the base fee was liable to be determined by the *entry* of the issue, with this distinction, that if the assurance creating the *base* fee were a feoffment, the issue were deprived of their right of *entry*, being driven to their *action of formedon*. The base fee during its existence had all the incidents of a fee simple except the first; and, unlike an estate tail, it merged in the immediate remainder or reversion whenever the two estates became united in the same person, [but this is not now the case; for by the 3 & 4 W. 4, c. 74, s. 39, the base fee is enlarged to an absolute fee driving out the reversion; a similar enactment occurs as to lands in Ireland in the statute 4 & 5 W. 4, c. 92, s. 37.] If this estate were created by lease and release, the owner could not levy a fine which would have had any effect on the remainder, because a lease and release being, in the language of the law, an innocent assurance, it did not operate to discontinue the seisin under the remainder; and it was a rule that a fine could not operate by non-claim against any person unless the estate of that person was discontinued and turned into a right. Nor could the tenant in tail, after having conveyed a base fee by

An estate in fee *qualified* or *base* is an estate to *A.* and his heirs *till a certain event happen,*

Supra, p. 118. lease and release, or other innocent assurance, subsequently, by levying a fine to the releasee in fee, discontinue the remainder, (*Seymour's case*) 10 *Rep.* 96, unless the lease and release and fine were parts of the same assurance, 2 *Burr.* 704. If the base fee were created by feoffment, fine, or any other tortious mode of conveyance (a term which will be explained in a future page), the operation of the feoffment, fine, or tortious alienation was to convert the seisin under the remainder into a right of action, which a subsequent fine by the tenant of the base fee might have barred by non-claim, if the remainderman slept upon his right of action for five years after its commencement; that is, either for five years after the fine levied, or for five years after the determination of the estate tail by failure of issue. [But now by the statute 3 & 4 *W.* 4, c. 27, s. 36, all real and mixed actions are abolished, except a writ of right of dower, or writ of dower *unde nihil habet*, or a *quare impedit*, or an ejectment: and by section 39, it is enacted that no descent cast, discontinuance, or warranty, after the 31st Dec. 1833, shall toll or defeat any right of entry or action for the recovery of land. Now by the statute 7 & 8 *Vict.* c. 76, s. 7, it is enacted that no assurance shall create any estate by wrong.]

An estate in fee simple may be created by *deed* or *will*.

If by *deed*, the word "heirs" is absolutely necessary to its creation; and no other word or periphrasis can supply its place, except the word "successors" in a grant to a corporation. If, therefore, a grant be made to a man without the word "heirs," or to him "for ever," or to him and "his assigns for ever," or to him "in fee simple," or to him and "his heir" (by some authorities), or to him "for an estate of inheritance in fee simple," [or to him "and his issue,"] or to him "and his blood," or to him "and his successors," or to him "and his

Co. Litt. 8, b.
Perk. 243.
20 *Hen.* 6, f. 36.

[1 *Cro. & Mee.*
210.]

or to be defeated if such an event occur, as to *A.* and his heirs tenants of the manor of Dale.

lineal or collateral descendants and relations"—in all these instances he will take an estate for life only, although livery of seisin be made therewith "to hold to him and his *heirs* according to the within-written indenture." The common law adopted this strict and salutary rule to "avoid uncertainty, the mother of contention;" and it has often been lamented that the same rule has not been adhered to in the construction of wills. So a limitation to "*A.* or his heirs," or "to two persons and heirs," will confer but an estate for life, on account of the uncertainty. But a gift to one person *and heirs* passes a fee; and it is the better opinion, that a limitation to a person and his *heir* will confer a fee. A fee simple will pass to a corporation aggregate as to [the mayor and commonalty of a city, the head and fellows of a college, or to] a "dean and chapter," without any words of succession: but a bishop, parson, or other sole corporation cannot take a fee by deed without the word "successors." The word "heirs" as to them will not be sufficient to carry the fee.

In this [as in all other legal estates of freehold] there may now be a seisin, a use, and a trust. Thus, in a conveyance to *A.*, to the use of *B.*, in trust for *C.*,—*A.* has the seisin, *B.* the use, and *C.* the trust. By the Statute of Uses the seisin of *A.* is transferred to *B.* immediately on the execution of the conveyance. Before that statute the seisin or legal estate remained in *A.*; and *B.* took a mere equitable estate, that is, an estate not recognised at law but only in equity, the trust of the present day being then unknown. To create a fee simple in the seisin, it was necessary to observe the rules above alluded to: but a fee simple might have been created in the use as it existed then by any words or circumstances indicative of an intention in the parties to create such an estate. Thus if *A.*, in consideration of 100*l.* paid by *B.*, conveyed an estate to *C.* and his heirs, to the use of *B.*

1 *Plow. Com.*
25, b.

Co. Litt. 13, b.
29 *Hen.* 6, f. 73.

Dubber v. Trollope, *Amb.* 453.

1 *Roll. Ab.* 833.
Co. Litt. 94, b.
1 *Ath.* 437.

Here, so soon as *A.* or his heirs cease to be tenants of that manor, the estate will cease.

without more, or to him and his assigns for ever, &c. *B.* would have taken an estate in fee simple. The reason was, that uses at that period being only cognizable in a Court of equity, the Chancellor held it accordant with good conscience that the *intention* of the parties should be carried into effect, though, in doing so, some of the rigid rules of law might be contravened. Then came the Statute of Uses, and enacted that the "estate, right, title, and possession" of *A.* should be transferred to and vest in *B.*, in such quality, manner, form, and condition as *B.* previously had in the use. Now, by the last-mentioned form of limitation, *B.* took an estate in fee simple in the use before the statute; he should, therefore, receive an estate of a similar description in the seisin and use consolidated in him since the statute. The statute, moreover, transfers the *estate* of the seisinnee to the person having the use; that estate in the above instance was the fee simple, which, therefore, should be considered as transferred to and vesting in *B.*—*B.* then having the seisin in fee, and the use in fee, the question is, whether that fee is to be reduced to an estate for life, because the words creating the *use* were insufficient at law to create a larger estate; or whether all uses since the statute are not to be viewed as legal estates from their inception. That the seisin is not so completely absorbed in the use as to be indistinguishable from it, is evident from the fact that, at this day, the seisin must be commensurate with the use to create a fee simple. Thus, if an estate be conveyed to *A.* generally, or "in fee simple," &c. (so as to give him a mere life interest by the rules of law) to the use of *B.* and his heirs, *B.* will take an estate for the life of *A.* only. The Statute of Uses effects a species of merger. At the present day, the trust merges in the legal estate, and not *vice versa*. So, before the statute, the use merged in the seisin, and not the seisin in the uses. The statute did not

[*Sed qu.*]

Meredith v.
Joans, Cro. Car.
244. Co. Litt.
42. 1 Saund.
Uses, 109.

The estate in fee simple absolute may be conveyed *ad infinitum*; but it being an estate of

alter the nature of the estates, but declared that the seisin should be transferred to the use. The consequence of that statutory conveyance was to merge the use in the seisin. It is *A.*'s seisin, therefore, that becomes the estate in possession in *B.*; and that seisin being a fee simple, and the quantity of interest in the use being also a fee simple (though not created by the means the common law recognises), it should follow that a Court of law would hold a conveyance to *A.* and his heirs to the use of *B.* "in fee simple," as conferring an estate in fee on *B.*; and not merely an estate for life, as it would indubitably do if the limitations were reversed.

It is laid down in the Year Books, that if a tenant in fee *bargain and sell* his land by deed indented and inrolled, though the *habendum* be not to the bargainee "and his heirs," yet he shall have the fee because the seisin in fee is in the bargainor, and the indenture and consideration raised the use which passed to the bargainee on the execution of the deed. The statute has since transferred the seisin in fee to the use. On the foregoing principles, then, it should follow that a bargain and sale for value will, since the statute, convey the fee simple of the bargainor to the bargainee without the word "heirs." Such, however, was not the *obiter* opinion of *Walmsley, J.*, who, after expressly referring to this case, observed, that "the uses since the statute are transferred and made into an estate in the land; and, therefore, he said, that if after the statute one person bargains and sells land to another generally for money, he (the bargainee) hath but an estate for life." Whether that opinion be well founded is submitted to be at least doubtful. It is adopted by *Mr. Sanders* and other writers. The point may occur if the word "heirs" should be accidentally omitted in the limitation of the use.

27 Hen. 8, f. 6.

Corbet's case,
1 Co. 87, b.

1 *Saund. Us.*
122, 4th ed.
See also 4 *Cru*
Dig. 98, ed. 4.
Willes. R. 180.
2 *Bro. C. C.*
233. 3 *T. R.*
765. 8 *T. R.*
519. 2 *Ves.* 257.

[In reference to the observations in the preceding note of *Mr. Coventry*, the present editor would remind the student

freehold in possession (for we are not here to speak of reversions,) the freehold must actually

2 Bar. & Ald.
128, *et seq.*

that it is a rule too well settled now to admit of question, that the same words are requisite to create an estate in fee in conveyances to uses, as are necessary in conveyances at common law, and for that purpose words of limitation are indispensable. In the case put of a conveyance to *C.* and his heirs in trust for *B.* (the purchaser) without words of limitation, *B.* does not take the fee in the use, by force of the limitation, but, by construction of equity, he would be held entitled to the equitable fee simple, and to call for a conveyance of it from *C.* The statute, therefore, could only confer the estate at law commensurate with the use actually limited, which was no more than an estate to *B.* for his life.

In the construction of trusts *executed*, the Courts of equity uniformly adopt the rules of law applicable to legal estates: but where the trusts are *executory*, as in articles made in contemplation of marriage, where some further act is to be done by the trustee to effectuate, by a future conveyance, the intention of the parties, Courts of equity, considering the articles in the nature of instructions for a settlement, have adopted a greater latitude of construction than they would admit if applied to limitations of legal estates, or trusts *executed*. This subject is fully discussed by *Mr. Fearne*.]

Rem. 113, 143
—147, ed. 8.
Vide *infra*,
chapter Uses
and Trusts.

It may also be proper to mention, that in fines and recoveries an estate in fee passed by the simple operation of those instruments without the word “heirs.” *Co. Litt.* 9. In short, they could not pass a less estate: but the uses founded on the seisin of the conuzee or recoveror might, of course, be moulded to any variety. And a rent granted by one coparcener to her companion for equality of partition will enure in fee without the word *heirs*, *Co. Litt.* 9.

WILLS.

For the words in WILLS which have been adjudged to pass estates in fee, in tail, and for life, to the devisee, see note in the chapter on *Devises*.

pass ; as by feoffment, lease and release, bargain and sale enrolled,* &c.

An estate in fee qualified or base may also be transferred by the same means, subject to the qualifications : but it cannot be conveyed discharged of such qualification, [although previously to the 7 & 8 *Vict. c. 76*, it might have been so conveyed] by wrong, as by a feoffment in fee, which would gain a fee absolute by disseisin,† and turn the reversion to a right, and which right might have been barred by a fine levied by the feoffee, unless the person having such right claim within the time allowed by the statute of *Hen. 8.*‡

* As the Author is not in this paragraph speaking of fees simple in *reversion*, it may be inferred that a conveyance of an estate in fee simple in reversion need not actually pass the freehold at the time the deed is executed. Such an inference is not founded in law. The freehold of the reversion must actually pass out of the grantor into the grantee immediately on the execution of the grant, and not at any future period. The necessity of the proviso in the parenthesis is not, therefore, very obvious.

† An estate gained by wrong is always a *quasi* fee: as the law cannot take notice of a wrong, it cannot, of consequence, set any limits to that wrong. See *Hob. 323.*—Note by *Mr. Watkins.*

‡ It is questionable whether a feoffment by a tenant of a determinable fee would have turned the seisin under the reversion into a mere right. To a due apprehension of the position in the text, we must distinguish between a determin-

Ferne,
546, 547.

A base or qualified fee may by possibility continue for ever; and the common law did not, therefore, permit any limitation on a fee either

able and a base fee: the former arises where a testator devises an estate to *Samuel Rolle*, and his heirs of the name of *Samuel Rolle*, for ever. Here no reversion arises to the testator's heir at law, but only a possibility of reverter, which *Samuel Rolle* cannot bar or affect by any means. This, therefore, cannot be the qualified fee alluded to by the learned Author. The only determinable fee which sustains a reversion is that of the base fee described in a former page (*ante*, p. 138); with respect to which it is observable, that if the remainder or reversion be not turned into a right by the means resorted to for the creation of the base fee,—that is, if the base fee be created by an innocent assurance,—the reversion cannot afterwards be turned into a right, either by the tenant in tail or the owner of the base fee;—not by the former, because he being no longer seised by virtue of the entail, cannot discontinue the remainder; nor by the latter, because there is no privity between the owner of the base fee and the remainderman. See *Hard.* 400. *Irish T. R.* 567, *suprà*, p. 139. 1 *Burr.* 60, 2 *Cowp.* 689, 3 *Price*, 575, 3 *Barn. & Cress.* 388. If the estate tail be spent and the base fee determines, then a continuation of possession by the tenant of the base fee for five years after a fine levied by him, when seised in right of the base fee, would bar the remainderman or reversioner; which is all, perhaps, that the learned Author intended to intimate by the above passage. The conclusion of the paragraph shews his meaning: “unless the person having the right claim within the time allowed by the statute.” What is that time? Five years after the right accrues; consequently the qualification is not absolutely discharged until five years after the happening of the event upon which the determinable fee depends. This, perhaps, is the inference intended by the text.

absolute or base.* A fee may now, indeed, be limited on a fee by way of *executory devise* or of *shifting use*; of which limitations I shall speak in subsequent chapters.

* There may be a reversion or possibility of reverter on a base or qualified fee; but the base or qualified fee could not be a particular estate supporting a remainder, because the particular estate and remainder must have been created together by the same deed, which it is evident could not be the case with a base fee and reversion.

CHAP. X.

OF AN ESTATE IN PARCENARY.

2 *Bl. Comm.*
187. 323.

Litt. b. 3, c. 1.
Gilb. Ten. 72,
73.—*Shep.*

Touchst. 14.

2 *Cru. Dig.* 391,
ed. 4. *Com.*

Dig. tit. Parc.

COPARCENERS always take by descent; and, as they compose but one heir, they have, as to some purposes, but one freehold; but, as to others, several; hence they may convey *to each other*, either by release, by feoffment, or [they might have conveyed to each other by fine*

* Coparceners, though they have a unity have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety. They may be said to have a several seisin as between themselves, and a joint seisin as it regards strangers. Being seised in moieties there is no survivorship between them. On the death of one coparcener her moiety descends to her heir at law, subject to her husband's curtesy if he be living, but the heir, (though a male, and a collateral,) or the husband as tenant by the curtesy, holds with the other coparcener in coparcenary. If the heir being a male dies in possession, leaving a widow, she it is apprehended, will be entitled to dower, and hold in coparcenary. In gavelkind the descent is to all the sons equally and they hold in coparcenary. This tenancy is destroyed by devise or alienation to a stranger. The effect of such devise or alienation is to convert the coparcenary into a tenancy in common. *Co. Litt.* 174, b. 175, a. But if there are three coparceners

previously to the recent statutes by which fines and recoveries were abolished.]

and one aliens, the other two hold in coparcenary as between themselves: with respect to the alienee, they hold in common. The possession of one coparcener is [in cases of descents happening upon deaths previous to the 1st January, 1834,] that of the other so as to create a seisin in the other, and carry her share by descent to her heirs, although that other never actually entered, [as where *A.* died seised in fee intestate, leaving two daughters his co-heirs, *Elizabeth* and *Sarah*, but by different mothers. The entry of the widow, the mother of *Sarah*, as her guardian in socage, was held to constitute an actual seisin in *Elizabeth*, so that upon her death her moiety descended to her heirs at law, and not to *Sarah*, who would otherwise have taken as heir to her father. *Doe v. Keen*, 7 *T. R.* 386. The effect of the new law in such a case is worthy of notice. It renders the entry of the guardian in socage nugatory, as conferring upon *Elizabeth* an actual seisin, for that is no longer necessary; descents being traced under the stat. 3 & 4 *W. 4*, c. 106, to the last purchaser or person entitled otherwise than by descent, (*s. 1.*) So that upon the death of *Elizabeth*, as she took by descent, she was not a purchaser within the meaning of the act, and the descent was, therefore, to be traced from the father, who was the last purchaser and *Sarah* was his heir. Had *Elizabeth* become a purchaser, within the meaning of the act, then upon her death intestate and without issue, her moiety would, by *s. 9*, have descended from her to *Sarah*, her sister by the half blood, as her heir.] Entry by one coparcener, when not *adverse* to her companions [previously to the stat. 3 & 4 *W. 4*, c. 27,] enured to the benefit of all, *Doe v. Pearson*, 6 *East*, 173. 2 *Smith*, 295: [but by *s. 10*, of that statute it is enacted, that no person shall be deemed to have been in possession within the meaning of the act by mere entry; and by *s. 12*, that the possession of one coparcener, joint-tenant or tenant

As to *strangers*, they must convey their respective portions or shares by such a conveyance

in common, who shall have been in the possession or receipt of the entirety, or more than his share, for his own benefit, or for the benefit of any other person than the person entitled to the land or rent, such possession or receipt shall not be deemed the possession or receipt of such last mentioned person.] When an advowson descends to coparceners, they present according to seniority, the eldest sister taking the first turn, the second the next, and so of the rest. *Plow.* 333. 1 *Bac. Abr.* 693. *Gwil.* Ed.

Coparcenary relates to the estate—joint-tenancy to the person.—Hence a man may be coparcener with himself. Suppose two moieties of an estate to descend upon the same individual, one from his father, and the other from his mother, he may fairly be said to possess the estate in coparcenary; for on his death without lineal descendants, one moiety will descend to his heir on the part of his father, and the other to his heir on the part of his mother.

That the seisin of coparceners is *joint*, is evident from the circumstance that one might [even before the statutes 4 & 5 *Vict. c.* 21, and 7 & 8 *Ib. c.* 76] release to the other without a bargain and sale for a year to vest the actual seisin: that it is *several*, is evinced by the validity of a feoffment from one coparcener to his companion. A tenant in common may enfeoff his companion, because the freehold is several, but he cannot release to him for want of a joint seisin. A joint-tenant may release to his companion because the freehold is joint, but he cannot enfeoff his companion for want of a several seisin. Coparceners, however, may both release to and enfeoff their companions; for their seisin is both joint and several. *Co. Litt.* 200, b. The effect of a release from one coparcener to another is not exactly settled. Thus it is remarked by an eminent writer, that a release from one coparcener to another does *not* make any degree in the title: the releasee being in by descent and not by purchase. 2 *Pres.*

as will pass the freehold ; as by feoffment, lease and release, or bargain and sale ; or they may

Abs. 70. The consequence of this position is, that judgments against the releasor are not incumbrances. But, by *Lord Coke*, “ if there be two coparceners and the one release all his right to the other, this shall enure by way of *mitter l’estate* and *shall make a degree*, and without the word ‘ heirs ’ shall pass the whole fee simple.” *Co. Litt.* 273, b. And this seems the preferable doctrine, as will appear by the following considerations. When two persons take a joint seisin on a descent or conveyance, the notoriety attendant on that event is sufficient to support a release by one to the other of them without a second delivery of seisin. *Gilb. Ten.*

72. Indeed a second delivery of seisin would be nugatory, as the releasee is already as much in the seisin of the whole estate as he would be by another delivery of it. A release by one of two coparceners to the other of them is called as above a release by way of *mitter l’estate*. This species of releasee does not operate directly by enlargement, for the releasee has no *estate* in his companion’s moiety which may be enlarged. It simply conveys the estate of the releasor in a moiety of the land to the releasee without the necessity of livery of seisin. The releasee takes the estate by conveyance, the seisin being already in him by descent. The seisin is swallowed up in the estate so that the release operates by extinguishment in one sense and by enlargement in another ; but as it does not operate directly in either way, the law properly calls it a release by way of conveyance, and if of conveyance the releasee must be in by purchase and not by descent. He must come in, in the *per*, by or through his companion, and not by title paramount to him by their common ancestor. The consequence is, that if a woman entitled to an estate marries and dies, leaving two daughters, and one of them releases to the other, and then they both die without issue, one moiety of the estate will descend to the

covenant to stand seised; [the conveyance by fine and recovery being now abolished.]

Touchst. 292.

But they cannot exchange with each other 'till partition.*

heir of the releasee on the part of her mother, and the other moiety will descend to her heir on the part of her father. It should also follow that if one of the daughters, after the death of her mother and before the release, makes her will [before the 1st day of *January*, 1838,] and devises all her estate and interest in the land, the devisee will take only that moiety which the testatrix had at the date of her will, and not that which she subsequently acquires by the release; and in this respect a partition (which may be effected by mere agreement and makes no degree in the title) is essentially different, as will be presently seen. A republication of the will after the release would doubtless enable the devise to carry the entirety of the land, the words being "all the estate and interest of the devisor," [and the effect would be the same under the 1 *Vict. c. 26*, without republication;] but if the words be (as in *Luther v. Kirby*, 8 *Vin.* 148) "all that my moiety" it is difficult to perceive how a republication could make the will operate on more than what it expressly states to be the subject of it, viz. *one moiety*. *Vide infra*, p. 154, *in notis*.

* What have they to exchange? They are seised in moieties, and if they exchange each other's moieties they are still in the same situation. Suppose two farms, *A.* and *B.*, descend to two coparceners *C.* and *D.*, and *C.* exchanges her moiety in farm *A.* for *D.*'s moiety in farm *B.*, and so *vice versa*. By this process *C.* will become seised of farm *B.*, and *D.* of farm *A.* in severalty. But this is a partition, not an exchange. It seems therefore true, as stated in the text, that there cannot be an exchange between coparceners until partition.

If there be two parceners, and they make partition by consent, they may release to each other their respective moieties, and [even before the statute 4 & 5 *Vict. c. 21*, which dispenses with the lease for a year in the conveyance by lease and release] there would be no necessity for a lease for a year (or bargain and sale,) as the possession at the time of partition would be in each.*

[7 & 8 *Vict. c. 76.*]

[No partition or exchange can now be valid except by deed, 7 & 8 *Vict. c. 76, s. 3.*]

* As the undivided estate of coparceners is cast upon them by act of law the severance of their interest was much favoured of old, and thence it was, that partition by *parol* was allowed. The third section of the Statute of Frauds, 29 *Car. 2, c. 3*, now requires that all *parol* agreements respecting the transfer of estates in land shall be reduced into writing, and signed by the party to be charged therewith. A simple written agreement, [before the statute 7 & 8 *Vict. c. 76,*] made between persons free from the disabilities of infancy, coverture, &c. was as effectual to sever the jointure as the plan usually adopted by lease and release; [but now partition must be by deed, although before the above statute] an actual *conveyance* was not essential to the validity of a partition. The deed of partition is less than a grant. It does not operate by a fresh investiture of the seisin, for coparceners are already in the entire seisin by descent; it simply dissevers the unity of possession and makes no degree in the title. If the lands were derived *ex parte maternâ* they will still continue descendible in that channel,* and a will made prior to the partition will remain in force notwithstanding a fine be levied to perfect the severance. 8 *Vin.* 148. 7 *Ves.* 558.

* [*Doe v. Dixon*, 5 *Adol. & El.* 831.]

As to the will, however, some few observations remain to be made. If a coparcener before partition devises "all her estate and interest in the land," *that* will carry all her interest in the allotment assigned to her on partition after the date of her will; for there is no new acquisition by the partition, and the testatrix will have been seised of the same estate at the respective times of making her will and of her decease. So if she devise "all that her *moiety* of forty acres of land in *A.*," and she afterwards receives twenty acres on partition as her share, the words of the will are sufficient to include the whole twenty acres, for that is her moiety in severalty. But if she devise all that her "*undivided moiety*" it is questionable whether those words will pass a "*divided entirety*," for *non constat* that she meant to pass an estate in severalty by words strictly applicable to an estate in jointure, and it admits of doubt whether such a devise would not fail altogether for want of *evidence* of intention; but some gentlemen conceive that the will will be good as to one moiety* of the lands received in severalty, and that the other moiety will descend to the testatrix's heir at law. The general rule is, "that if at the death of the testator there is no interest in him to answer the description in the will the devise cannot operate," *per* Lord Chancellor, in *Knollys v. Alcock*, 7 *Ves.* 565. But if two farms *A.* and *B.* descend to two coparceners *C.* and *D.*, and *C.* devises "all her estate and interest in farm *A.*," or "all that her moiety in farm *A.*," and on partition the entirety of farm *B.* is allotted to her, the devise is rendered nugatory by this partition, for want of applicability in the words of the will to the thing devised.

In *Luther v. Kirby*, 8 *Vin.* 148. 3 *Pr. Wms.* 169, (B.). *A.* and *B.* were tenants in common of the manor of *Bemfleet* and several farms and lands thereto belonging. *A.* made her will, and devised unto trustees "all and singular her *moiety*

* [It would seem that such would be the effect upon one moiety at least under the recent Statute on Wills, 1 *Vict.* c. 26, s. 23, in wills made upon or since 1st *Jan.* 1838.]

of the said manor and lands." Afterwards *A.* and *B.* made partition by fine (*B.* being a married woman,) and *A.* died without republishing her will, leaving a son who contested the validity of the will. *Lord Chancellor King* directed a case to be made for the opinion of the Court of King's Bench, whether the partition and fine revoked the will; the Judges certified, "that the will was not thereby revoked, but that the share of the said *A.* in the lands contained in the deed and fine passed by her will to the trustees therein named." *Peere Williams* adds, "the Lord Chancellor concurred." *Mr. Preston* in his *Treatise on Abstracts* (adopting the argument of *Sir James Mansfield* when at the Bar) considers it difficult to comprehend how the accessional share could pass by the anterior will. 2 *Abs.* 72. *Sir James Mansfield* puts this case: "If a person seised as a coparcener of an estate in *Surrey* and another in *Middlesex* devises all his undivided moiety of the estate in *Surrey* to *A.*, and his undivided moiety of the estate in *Middlesex* to *B.*, and afterwards on partition agrees to relinquish his interest in the *Surrey* estate and to take the entirety of that in *Middlesex*, the partition, so far as it does not disturb his interest in the *Middlesex* estate, is no revocation, and the devise will take effect so far: but as to the *Surrey* estate it is gone; and the additional interest acquired in *Middlesex* not being devised goes to his heir." 7 *Ves.* 561. The Court did not in direct terms deliver an opinion on this point; but said, that if by means of the partition the words of devise cannot possibly amount to a description of the thing, the will must be revoked. *Knollys v. Alcock*, 7 *Ves.* 565. In that case *A.* and *B.* were entitled to estates in *Berkshire*, *Lincolnshire*, and *Oxfordshire*, in coparcenary. *A.*, by will dated June, 1795, devised "all her real estates in the counties of *Lincoln* and *Oxford*" to *Alcock* and his heirs; and "one full half of her undivided moiety of the *Berkshire* estate" to *Martin*, in fee; and "the other half part" to *Longmire*, in strict settlement. [The case is not very succinctly reported: but it appeared that, before

the date of her will, the testatrix had executed a conveyance to *Alcock* of all her interest in the *Lincolnshire* and *Oxfordshire* estates, which by her will she distinctly confirmed. This conveyance was proved to be not merely voluntary but fraudulent; and *Lord Rosslyn* throughout his decree treats it as absolutely void: yet, with the concurrence of the heir, he seems to have considered this void conveyance as well confirmed by the will. 5 *Ves.* 649. 7 *Ib.* 560. Putting the conveyance out of the case, the devise stands as above stated.] In Nov. 1795, *A.* and *B.* entered into a written agreement for a partition, whereby it was agreed that *A.* should enjoy the *Lincolnshire* estate, and *B.* the *Berkshire* estate, in severalty; and that the difference in value between those two estates, whatever it might be, should be made up out of the *Oxfordshire* estate. It appeared that the *Lincolnshire* and *Oxfordshire* estates were but both equivalent to the *Berkshire* estate; and *Lord Rosslyn* therefore held, that as the testatrix, at the time of her death, had departed with all interest in the *Berkshire* estate, *Martin* and *Longmire* took nothing by the said will. 5 *Ves.* 649. On petition of rehearing, *Lord Eldon* observed, that “if a partition is effected, either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation; but the slightest addition to that purpose will make it a revocation; if parties will even introduce a power of appointment prior to the limitation of the uses, that very slight circumstance, as it would be considered if it were *res integra*, is sufficient [but the descent it is presumed would not be altered thereby:] if coparceners have an estate in *Berkshire*, after partition that would be a moiety of the *Berkshire* estate, and it would pass by the will; but if it is made so that the words of the will cannot by possibility amount to the description of the thing, how can it not be a revocation? This testatrix at her death has no *Berkshire* estate; are the devisees to take an equivalent out of the *Lincolnshire* and *Oxfordshire* estates? I cannot say *that*, for this will does not operate upon the

tenements in those counties. It seems, therefore, that taking it to be matter of partition, yet if the manner of it destroys the interest of the testator in the thing given, so that at his death there is no interest in him to answer the description, the devise cannot operate ; as to the particular point, what *Martin* and *Longmire* take by the will, I cannot think that *Lord Rosslyn's* decree has miscarried upon *that* : the decree must be affirmed." *Knollys v. Alcock*, 7 *Ves.* 566.

CHAP. XI.

OF AN ESTATE IN JOINT-TENANCY.

2 *Bl. Com.* 179.
Litt. b. 3, c. 3.

JOINT-TENANTS always take *by purchase* :* and the proper and best mode of creating an estate in joint-tenancy is to limit “to *A. B.* and *C. D.* and their assigns,” if it be an estate for life ; or “to *A. B.* and *C. D.* and their heirs,” if in fee.† The limitation sometimes made “to *A. B.*

Butl. n. (1) to
Co. Litt. 191, a.
n. (61).

* And there may be a joint-tenancy for life or in fee, but not in tail ; unless the donees being male and female may lawfully intermarry. As if an estate be limited to two brothers, and the heirs of their bodies ; if this were a joint-tenancy, then in the event of one brother dying leaving heirs of his body, the whole would go over to the survivor, in direct opposition to the terms of the limitation ; but the statute *de donis* has ordained that the will of the donor be implicitly observed ; and, therefore, a limitation as above has been construed to give the donees estates for life in joint-tenancy with several inheritances in tail. *Dyer*, 326. *Co. Litt.* 184, a.

† The invariable rule at law is, that when lands are conveyed to two or more persons without any modifying or disjunctive words, they take as joint-tenants. The rule is the same in equity, but it there admits of exceptions. “If two people join in lending money on mortgage, equity says, it could not be the intention that the interests should survive ; though they take a joint security, each means to lend his own

and *C. D.* and *the survivor of them, and the heirs of such survivor,*" is objectionable, as, if there be nothing to control the legal operation

¹ *Fearne*, 283.
³ *Anstr.* 836.
Biggot v. Smyth, Cro. Car. 102.

and take back his own." *Per Lord Apsley*, 3 *Ves.* 631. S. L. 2 *Ves.* 258. The consequence is, that though the entire legal estate is in the survivor, yet the personal representatives of the deceased mortgagee are necessary parties to a reconveyance, in order to obtain a discharge of their share of the mortgage money; and, until the money be re-paid, the surviving mortgagee is, in equity, a trustee for the personal representatives of his deceased companion. *Carth.* 16. Hence it is necessary, when trustees advance money on mortgage, to add a clause making them joint-tenants of the money as well as of the estate. If the mortgage be foreclosed, or the mortgagees purchase the equity of redemption, and take a conveyance, without dis severing words, equity still holds them to be tenants in common according to their proportions in the money, although the legal estate be held by them in joint-tenancy, unless by express stipulation the contrary is provided for. *Pr. Ch.* 332; 2 *Ves.* 258. When trustees advance money, it is proper to limit the estate to them in joint-tenancy, with a declaration that they shall be joint-tenants in equity: but when two persons advance money on mortgage in equal shares, it is a desirable object to give them distinct and descendible interests in the land. For this purpose the usual words of severance should be added; or an aliquot part of the estate, equal to the sum advanced by each mortgagee, may be limited to each for a term of years, with cross remainders between them in fee. This plan is mentioned by *Mr. Coote* in his *Treatise on Mortgages*, Ed. 2, pp. 128, 722, but he does not point out any particular advantages resulting from it, further than as it keeps the mortgagees on an equality, and yet gives them distinct liens on the whole estate.

[7 & 8 *Vict.*
c. 76, s. 9.]

Another exception in equity is, that when two persons pur-

of the terms, they would give [what before the 7 & 8 Vict. c. 76, was] *a contingent remainder to the survivor*.*

chase an estate, and advance the purchase money in *unequal proportions*, they are deemed to be tenants in common, although the conveyance may be made to them generally, provided the inequality of the consideration be apparent on the conveyance. If they advance the money in *equal shares* and take a conveyance generally, a Court of equity has nothing whereon to ground an inference that this was not a joint purchase of the chance of survivorship, and they will be held to be joint-tenants accordingly; but if one of such joint-tenants lays out considerable sums in repairs and improvements, he will be held to have a lien on the land for the sums so expended. *Lake v. Gibson*, 1 Eq. Ca. Abr. 291. 1 Vern. 217. 3 Pr. Wms. 158. Wares, merchandise, and stock in trade, belonging to joint-merchants or partners, survive to the representatives of the deceased partner; the rule being *jus accrescendi inter mercatores locum non habet*. So, if a freehold shop or warehouse be conveyed to merchants or partners in trade, it is conceived that in equity they will be tenants in common, and that the survivor will be held to be a trustee of the legal estate, as to one moiety in trust for the personal representatives of his deceased companion.

* [The remainder in the above limitation being contingent so long as the survivor is not ascertained, could not, before the stat. 7 & 8 Vict. c. 76, if relating to lands in *England* or *Wales*, be conveyed *at law*, so as to transfer the estate in remainder to the grantee, should the grantor eventually be the survivor: but it might have been assigned *in equity*, that is, it might be the subject of agreement so as to bind the party contracting, should the remainder ever vest in him. But now by the above statute it may be so conveyed, s. 5.

Weale v. Lower,
Pollex. 54.

Before the stats. 3 & 4 W. 4, c. 74, as to *England*, and 4 & 5 W. 4, c. 92, as to *Ireland*, it might by fine have been

[But where the gift is to *A.* and *B.* and the survivor of them *their* heirs and assigns for ever, [*Doe v. Sotherton*, 2 *Burn.* & *Ad.* 628.]

extinguished or bound by estoppel: It might also then, [and until the recent stat. 7 & 8 *Vict. c.* 76, it might have been] destroyed without a fine, by the concurrence of the tenants for life, (*A. B.* and *C. D.* in the [limitation objected to]) with the reversioner or his heir, during the contingency, in a conveyance in fee to a third person: this operated as a surrender of the life estates, and a conveyance of the reversion: the former merged by union with the fee, and consequently the contingent remainder was destroyed. *Purefoy v. Rogers*, 2 *Saund.* 380. *Thompson v. Leach*, 2 *Ventr.* 198. *Fearne C. R.* 317, 358, *ed.* 8, [but now by the statute 7 & 8 *Vict. c.* 76, *s.* 8, such a remainder cannot be destroyed merely by the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine.] *Davies v. Bush*, 1 *M. Cl. & F.* 58.

[The preceding observations may be illustrated by facts which occurred in practice. Lands were devised to *A. B.* and *C. D.*, and to the survivor of them and his heirs: *A. B.* was the testator's heir at law, and contracted with *C. D.* for the sale of his interest. By lease and release, in consideration of the purchase money, *A. B.* and *C. D.* conveyed to *E.* in fee, upon trust to reconvey to *C. D.* in fee; and a short reconveyance was accordingly made by indorsement to *C. D.*, who by this mode acquired the absolute fee.

With respect to lands in *Ireland*, contingent remainders might be conveyed by virtue of the 22nd section of the stat. 4 & 5 *W.* 4, *c.* 92, in the same manner as vested estates: and now with respect to lands in England and Wales, they may be conveyed by virtue of the 7 & 8 *Vict. c.* 76, *s.* 5. See Chapter XVIII. on Possibilites, *infra*.

In limiting estates to trustees, the devise or conveyance should be, "to and to the use of the trustees, their heirs and

they will take a joint-tenancy in fee and not estates for life, with remainder in fee to the survivor.]

See *Co. Litt.* 188, a. and n. (13), and 1 *Fearne*, 460, &c. (4th ed.) 239, 3d ed.

In the creation of a joint-tenancy it is not only necessary that the estate to the several persons *be limited by the same deed*, but the estate in them must *vest at one and the same time*; for if an estate be limited to *A.* for life, with remainder to the heirs of *B.* and *C.* (*B.* and *C.* being supposed to be living,) and *B.* die *during the particular estate*, when one moiety would vest in his heirs, and afterwards *C.* die, *in the lifetime of A.*, when the other moiety would vest in his heirs, the heirs of *B.* and *C.* would take in common.

But if the estate be limited *by way of use* it would be otherwise; as the estate would be in the trustee 'till the uses arise; and *as* they arise, the *cestui que use* shall be in by the original feoffment or deed.*

assigns;" but *powers* should be limited to trustees "and the survivor of them, his executors or administrators or their or his assigns. 1 *Barn. & Ald.* 608. 3 *Madd.* 272, for even in powers relating to real estate, such as powers of sale and exchange, it is advisable to give the power to the personal representatives of the surviving trustee to prevent the inconvenience of an infant heir. *Butl.* note 1 *Co. Lit.* [vii. 2] 271, b., see also 1 *Chance on Pow.* [696]].

[* This paragraph is very obscure. It is submitted with deference to the learned author, that the heirs would take as tenants in common under the circumstances supposed in the

As joint-tenants are as to all purposes* seised *per mie et per tout* they cannot grant nor bargain and sell, nor surrender, nor devise,† to each other ;

1 Vent. 78.
Cro. Jac. 696.

1 Vent. 78.
Cro. Jac. 696.
Perk. S 586,
587. Touch.
303. Powell
on Dev. 174.
Touch. 292.
Gilb Ten.
73, 74.

text, whether the limitation take effect at common law, or by the operation of the Statute of Uses, or by way of trust ; as in the three following forms of limitation, (namely) *habendum*, to *A.* for life, with remainder to the heirs of *B.* and *C.*, or to and to the use of *A.* for life, remainder to and to the use of the heirs of *B.* and *C.*, where the limitation takes effect at common law, or where the *habendum* is to *J. S.* and his heirs to the use of *A.* for life, remainder to the use of the heirs of *B.* and *C.*, in which case the limitation takes effect by the statute, or where the *habendum* is to and to the use of *J. S.* and his heirs upon trust for *A.* for life, remainder, upon trust for the heirs of *B.* and *C.* If *B.* and *C.* die at different periods in *A.*'s lifetime, their heirs take as tenants in common.]

* Lord Coke says, they are seised "*totum conjunctim et nihil per se separatim* ;" so that for the purposes of forfeiture and alienation they are not seised of a moiety *separatim*. [Thus if *A.* and *B.* are joint-tenants in fee of 100 acres, *A.* may convey an undivided moiety of the 100 acres, but not the entirety of 50, as the moiety of the 100 acres : if he affects so to convey 50 acres, an undivided moiety only of such 50 acres will pass.]

† We have seen that a partition by a coparcener is not a revocation of his prior will ; but as a joint-tenant has no devisable interest while the jointure continues, a partition of his interest will not have any effect on his prior devise : by republication, however, of a joint-tenant's will after partition it may be made to embrace the purparty derived by partition if the words are ample enough to comprise the estate. *Swift v. Roberts*, 3 Burr. 1496. If a joint-tenant [by a will made before the 1st January, 1838] devise to *A.* "all his estate and interest" in the lands in jointure, and then his companion

nor can they *exchange with each other* ; nor can one of them *enfeoff his companion*.

2 Maule & S.
165.

dies, whereby he becomes entitled to the whole, this will, unless it be republished after the survivorship has accrued, [will be inoperative.] Hence it should appear that the estate in the hands of the survivor is viewed as a *new acquisition*.

[But by the recent statute, 1 Vict. c. 26, for the amendment of the law of Wills made after the 31st December, 1837, the words of the above devise would, under the concluding branch of sect. 3, and sect. 24, pass all the surviving joint tenants' estate in the entirety, without republication of his will after the death of his companion. A devise by one of two joint-tenants in fee of his moiety is void against his companion surviving; the maxim is *jus accrescendi præfertur ultimo voluntati*. The law is not altered by the above act in this respect, the language of the first branch of the sect. 3, excludes estates held in joint-tenancy. All charges by one joint-tenant which cannot be supported at law or in equity, as a severance either entire or partial, are void against his surviving companion. An alienation by one of two or more joint-tenants of his share is an entire severance; so a partial alienation is a severance *pro tanto*, for *alienatio rei præfertur juri accrescendi*. A grant of a rent-charge by one of two joint-tenants, according to *Littleton*, s. 286, will not bind his companion surviving, for *jus accrescendi præfertur oneribus*; and he gives as a reason for the diversity between this case of a grant of a rent-charge and a lease, which is binding on the survivor, that notwithstanding the grant of the rent-charge, the tenements remain as they were before, no one having any right to any parcel of the tenements but the joint-tenants themselves; and the tenements are in the same plight as they were before the charge. But where a lease is made by one of two joint-tenants, presently, by force of the lease, the lessee hath right in the same land during his term. *Litt. s. 289, 2 Vern. 323.*] The lien of a judgment may be said to be in

But each may sever the tenancy at his pleasure, by granting his portion over to a stranger, either to the use of such stranger or to the use of himself, by the usual mode of conveying a freehold,*

expectancy during the jointure. If it be against the joint-tenant who survives, then it attaches on the land in severalty in the usual course. If it be against the deceased joint-tenant, [and execution is not sued out in his lifetime,] then as against the survivor it is altogether nugatory. 6 Co. 78, *Co. Lit.* 184, a. A legal mortgage by one joint-tenant is a severance of the jointure, and prevents a survivorship. At law a mortgage by a joint-tenant for years is an entire severance of the jointure, whether it be of all his interest in the term, or by way of under lease. *Co. Litt.* 192, a. [So if the above had been equitable mortgages, there would have been a severance in equity. *York v. Stone*, 1 *Salk.* 158. If an agreement by one joint-tenant to sell his share in a severance in equity, there can be no valid reason why an agreement to mortgage should not have the same effect in equity as the mortgage if legal would have at law; upon the same principle it is that an agreement to make partition is an equitable severance. 2 *Bro. C. C.* 224. *Per Lord Thurlow, C.*] But a mortgage by demise by a joint-tenant of the fee would not, it is conceived, work a severance of the jointure in the freehold, as a lease is neither a severance nor a suspension of the jointure; *vide* next note. As a further consequence of the right of survivorship an estate in joint-tenancy is not subject to dower or curtesy. *Co. Litt.* 30, a., 37, b., 183, a. If therefore one of two joint-tenants aliens during the jointure, his wife will not be entitled to dower; [but dower will, of course, attach upon the moiety of his companion; for after the alienation he will hold his moiety in severalty].

York v. Stone,
1 *Salk.* 158.

* If one bargained and sold all his estate and interest in a particular farm, and his companion died before the bargain

and sale was inrolled, whereby the bargainor at the time of inrolment was seised of the whole farm, yet the bargainee should only hold a moiety in common with the heir of the deceased joint-tenant, as the bargain and sale severed the tenancy at the time of its execution. *Co. Litt.* 186, a. If one joint-tenant in fee grants his moiety to a stranger for life, this is a *suspension*—not a *severance* of the jointure. After the death of the lessee the jointure revives, if the joint-tenants are living: during the life of the lessee, he and the other joint-tenant are tenants in common. If either joint-tenant dies during the suspension, his heir will be entitled to his moiety, for during the suspension the inheritance is severed. *Lord Coke* treats the inheritance during suspension of the freehold as in reversion, but it is not wholly in reversion—one moiety of it is in possession. *Co. Litt.* 191, b., 192, a. A lease for years by one joint-tenant to a stranger works neither a severance nor a suspension, but it passes only a moiety of the estate though it purport to embrace the whole; and although the lessor should afterwards become the survivor, or obtain the entirety by release, a moiety only will be leased. 2 *Roll. Abr.* 89. 2 *Pres. Abs.* 63. If the jointure continues to the time of the death of the lessor, the surviving joint-tenant will be bound by the lease as to the moiety comprised in it, [but the rent, not being incident to the reversion of the surviving joint-tenant, will cease. *Dyer*, 187, a., *infra*, Chapter XXII. Rents, *in notis*.]

[Where one of three or more joint-tenants conveys, it is a severance in respect of his share only; the remaining shares continue to be held in joint-tenancy, and, consequently, subject to survivorship between the remaining joint-tenants. This frequently occurs in practice where real estates have been devised or conveyed to three or more trustees and their heirs, which, as observed in the commencement of this chapter, creates a joint-tenancy. A conveyance from them is prepared, either to a purchaser or to the other trustees; *A.* one of the three trustees executes, and *B.* the second trustee dies without executing the deed, and afterwards *C.*,

or compel a partition, by statute ; or one may *release to his companion*.*

But joint-tenants may *exchange with a stranger*, or *surrender to the immediate reversioner*.†

the third dies without executing. The execution by *A.* is a severance only as to his third ; the two remaining thirds continued in *B.* and *C.* in joint-tenancy, and ultimately survived to *C.*, from whose heir at law, or devisee of estates held in trust, a conveyance of these two-thirds will be requisite. It is scarcely necessary to remind the student, that if *A.* and *B.* had executed, and only *C.* died before executing, a conveyance from his heir at law would also be necessary to complete the title in respect of his third. *Co. Litt.* 304. *Gale v. Gale*, 2 *Cox's Ca.* 156. *Denne v. Judge*, 11 *East*, 288. 2 *Pres. Abs.* 60. If *B.* and *C.* had died before the execution of the deed by *A.* in the case above supposed, his conveyance would of course convey the entirety.]

* In this releasee the releasee is already supposed to be in the tenancy by the feudal contract which created the jointure, and the release operating merely as a discharge of the benefit of that contract from the one joint-tenant to the other, the addition of words of inheritance in the release cannot be necessary, as the releasee has the inheritance already by the former conveyance, supposing that to be in fee. Hence a release from one joint-tenant to his companion does not make a *degree* in the title, it operates more by *mitter le droit* than *mitter l'estate*. *Co. Litt.* 273, b., and n. 2. But though this release will, for all purposes of conveyance, pass the moiety of the releasing joint-tenant to his companion, yet the usual practice was to take a conveyance by lease and release.

[† If a grant is made to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. *Humphrey v. Tayleur*, *Ambl.* 138. *Per Lord Har-*

wicke. So that if an estate be limited to two, as joint-tenants, and one of them dies before execution, the deed shall operate to pass the entirety to the grantee who survived. See also *Davis v. Kemp*, 2 *Carter's Rep.* *Mr. Preston* observes, upon this principle, it is, "that when a conveyance is to be made by a person resident abroad, for the benefit of a person resident in this country, it is advisable that the conveyance should be to and to the use of the purchaser and two other persons, in trust for the purchaser, and to the intent that the trust or beneficial ownership may be deemed and considered as vested in him and his heirs in fee simple from the date of the conveyance, notwithstanding his death before the execution by the grantors."—Note *Wath. Princ.* by *Preston*, 1823.]

In perusing abstracts it sometimes occurs, under the old uses to bar dower, that an attendant term is assigned to the person who is trustee of the fee in joint-tenancy with the purchaser. A question then arises, whether there is a merger of the term. It is apprehended, that there is a merger of the whole term, and not merely of a moiety of it; for as each joint-tenant is seised of the entirety, there is a legal union of the whole term and entire fee in one and the same person at one and the same time, in one and the same right. A distinction seems to be taken by *Lord Coke* between a surrender and a grant in this respect. He is understood to say, that if a lessee for life *surrender* to one of two joint-tenants of the reversion, this shall enure to them both; but if a lessee for life *grant* to one of two joint-tenants of the fee, the grantee shall take a moiety in fee, and as to the other moiety, he shall have an estate *pour autre vie*, with remainder to his companion in fee. *Co. Litt.* 192, a. b., 214, a. The reason may be, that livery of seisin was necessary to pass the particular estate in the latter instance, and that, therefore, the grantee must enter of a different estate to that which he before possessed in joint-tenancy, and so an essential unity of the jointure will be destroyed, and the tenancy consequently severed; whereas livery of seisin was not necessary to a sur-

[7 & 8 *Vict.*
c. 76, s. 2.]

render. *Thomson v. Leach*, 2 *Salk.* 618. An assignment of a term of years to the immediate reversioner cannot operate in any other way than by surrender, and consequently a severance of the jointure in reversion will not be thereby effected. 3 *Prest. Conv.* 153. We have seen that a lease for life by one of two joint-tenants is a severance during its existence, because of the livery (*ante*, p. 166;) and the acceptance by one of two joint-tenants of a conveyance of a similar estate should, for the same reason, operate in a similar way. But a lease for years is not a suspension of the jointure; neither, therefore, should the acceptance of such a lease be a suspension.—*Each* joint-tenant is *seised* of the whole estate, consequently an assignment to one should operate as an entire merger. If it be contended, that a moiety only of the term is merged, it is fair to inquire how the other moiety is situated. Is it vested in the trustee, with remainder to himself and purchaser in fee? If so, then a merger of a moiety of that moiety would ensue, and so inversely till the whole term is gone. Taking it, therefore, either way, the term seems to be merged. But a doctrine so refined cannot be confidently relied on; and it is principally to be resorted to, to assist the presumption of a merger or surrender of an old term which has lain dormant for a considerable time.

It is also observable, that a joint-tenant cannot grant his chance of survivorship to a stranger so as to bind himself by estoppel. 4 *Barn. & Ald.* 309. If a [grant is made to *A.* and *B.* for their lives, and *A.*] grants to a stranger, this is a severance of the jointure, and the stranger takes an estate for the life of the grantor in one moiety in common with the other joint-tenant, who is reduced to an estate for his own life in the other moiety. This consequence may be evaded by a declaration of trust, preserving the legal estate in joint-tenancy. So if two joint-tenants for life join in conveying "all their estate and interest" to a stranger, it should follow that this would likewise be a severance of the joint-tenancy, and confer on the grantee an estate in moieties for the respective lives of the grantors. If, instead of a joint con-

[*Sed qu.*, see *Ralph Bovy's* case, *Ventr* 193. 3 *Prest. Con.* 478, and *Ib.* 88—9. 6 *Cru. Dig.* pp. 472. 49;—*ed.* 4.]

veyance, each joint-tenant had conveyed by a separate instrument, it is clear that the stranger could not have held the *whole* for the life of the survivor, and there is nothing in the *joint* conveyance to work a different construction. In a late case, a copyhold estate was surrendered to *A.* and his wife for their natural lives *and the life of the longer liver of them*. They afterwards conveyed to a purchaser in general terms, and a question arose whether that conveyance passed more than an estate for their *joint lives*. The Court of King's Bench held that the purchaser took an estate for the lives of *A.* and his wife, and the *survivor* of them. *Doe v. Wilson*, 4 *Barn. & Ald.* 311.—It will be observed, that this is the case of a tenancy by entireties, and therefore, in many respects, distinguishable from a joint-tenancy. As to the latter, if an estate be given to two persons, not being husband and wife, “for their lives and the life of the survivor,” it should at first sight appear that they take a joint estate for their joint lives, with a contingent remainder to the survivor for life by *express* limitation; but the law implies just what that limitation dictates, as will be evident from a little consideration, and the rule is, that the expression of that which the law implies is without operation. Thus, in a gift to two persons for their lives without more, they become joint-tenants for lives, and on the death of one the whole remains to the survivor; to add, therefore, a limitation to the survivor in a gift of a joint-tenancy for lives, is but to express what the law implies: such addition, consequently, is nugatory and void.

The limitation to the longer liver must be treated as surplusage, and then the gift is to *A.* and his wife simply, which is a very near approach to a joint-tenancy for lives. But there is a material distinction between a joint-tenancy and a tenancy by entireties. Joint-tenants are seised *per my et per tout*; tenants by entireties are seised not *per my*, but *per tout* only. The consequence is, that if the husband and wife convey to a stranger, as to the husband, the conveyance operates to pass the entirety, and as to the wife, the conveyance operates to pass the entirety; so that, whether the

husband or wife be the survivor, the grantee has the entirety by *conveyance* from that survivor. With respect to joint-tenants, a difference is instantly perceptible. For the purposes of forfeiture and alienation they are seised *per my*; for descent and tenancy, *per tout*. Where two, being joint-tenants for their lives, convey to the same grantee, the conveyance operates as to one joint-tenant, to pass a moiety for the life of that grantor only, and as to the other joint-tenant, it operates to pass his moiety for his own life only. On the death of one the reversion as to a moiety falls in, and the grantee holds the other moiety only for the life of the surviving joint-tenant. Hence it is submitted, that the case of *Doe v. Wilson* does not govern the position proposed respecting the separate operation of a joint conveyance by two joint-tenants for lives.

To confine an estate for lives to the joint lives of the donees, the gift must be expressly to them for their joint lives, and then on the death of one the estate will cease; and it may be proper to remind the reader, that in the case of a gift to two persons and the survivor of them, *and the heirs of such survivor*, they take as joint-tenants for their joint lives, with a contingent remainder to the survivor in fee. The words in italics are not implied by law, and are consequently not surplusage.

Supra, p. 158,
160.

A covenant or agreement by a joint-tenant to *sell* creates an equitable severance of the jointure, and will be enforced in equity against the survivor, notwithstanding the *dictum* in 2 *Vern.* 63. See 2 *Ves. sen.* 634. *Brown v. Raindle*, 3 *Ves.* 257. *Mr. Preston*, however, considers it questionable whether the contract will be enforced *against the survivor*, but on what grounds does not appear. 2 *Abs.* 67. If the contract be an equitable severance (and that it is so all the books agree), it seems strange to say that it shall be enforced against the contracting party himself, and not against the survivor. A contract is more than a mere lien or charge, it confers an estate executed, on the rule, that what is agreed to be done, is in equity considered as actually performed; and

a contract to levy a fine by a tenant in tail does not seem to be in *pari materiâ*, as such a contract is not deemed of any efficacy against the issue in tail, from the peculiar wording of the statute *de donis*.

Judgments and crown debts against a deceased joint-tenant do not affect the estate in the hands of the survivor ; but if a joint-tenant aliens so as to sever the jointure, or if he becomes the survivor or sole owner by release, prior judgments against him become available charges on the property. *Litt. s.* 286. 6 *Co.* 78, b. So of dower and curtesy. *Co. Litt.* 30, a., 183, a. But the surviving joint-tenant is entitled to emblements, if the jointure continues up to the death of one of them. 2 *Vern.* 323.

CHAP. XII.

OF A TENANCY IN COMMON.

TENANTS in common take also *by purchase*, 2 Bl. Comm. 191. Litt. b. 3, c. 4, and the Comment. but hold by distinct titles, and have *separate freeholds*, being not seised *per mie* and *per tout*, as joint-tenants are :* and the best way to create a tenancy in common is either to limit one moiety of the premises expressly to one, and the other moiety to the other, or to use the words “to hold as tenants in common and not as joint-tenants;” as the law may otherwise construe it a joint estate.†

* They have also separate inheritances as distinct from each other as several tenants. Therefore a lease by two tenants in common operates as a distinct lease as to each of them. *Co. Litt.* 45, 200. If two tenants in common in fee grant a rent-charge of 20s., the grantee will have two rent charges of 20s. each, one out of each moiety; and no words expressive of a contrary intention will prevent this effect. *5 Co.* 7, b. To do *that*, they should join in a conveyance to *A. B.* and his heirs, to the use, intent, and purpose that the annuitant might receive one rent charge of 20s. out of the lands thereby released.

† In a will, the words “equally to be divided”—“equally between or to them”—“equally” alone—“respectively”—

Touchst. 292.

As the possession of tenants in common is undivided till partition, they *cannot exchange with*

“rateably”—“share and share alike,” and words of a similar distributive import, create a tenancy in common, as well in respect of real as personal estate. 2 *Vent.* 366. 1 *Vern.* 32. 1 *Lev.* 232. *Styles*, 434. *Salk.* 226. *Het.* 29. *Cowp.* 657. 1 *New Rep.* 82. 3 *Ves.* 260. 2 *Ca. Chan.* 56. 2 *Atk.* 121. 2 *Meriv.* 70. 2 *Bing.* 151. 2 *Roper’s Leg.* 329, ed. 1828. [There was formerly a difference of opinion whether the words “equally to be divided,” or words of similar import would, in deeds operating at common law, create a tenancy in common, as where a feoffment was made to *A.* and *B.* and their heirs, equally to be divided between them: it was, however, admitted that, in conveyances operating by the Statutes of Uses, the words would have the effect, as in a feoffment to *A.* and his heirs, to the use of *B.* and *C.*, and their heirs, equally to be divided between them. But the law appears to be now settled that those words will have the same construction in deeds, whether operating by statute, or at common law. *Fisher v. Wigg*, 1 *P. Wms.* 14. *Rigden v. Vallier*, 2 *Ves.* 252; 4 *Cru. Dig.* 294, Ed. 4; 1 *Wils.* 341; *Cowp.* 660; 1 *Watk. Cop.* [113] 144, 4 Ed. *in notis, supra in notis*, 144.] Real estate purchased with partnership property is, to all intents, considered in equity as held in common, though the conveyance may have been to the partners in joint-tenancy. 3 *Bro. C. C.* 200, *Eden*, Ed.

[This last proposition requires some qualification. In the absence of any agreement between the partners that the real estate so purchased shall be considered personalty, it seems doubtful whether the mere circumstance that the land was bought for the purposes of the partnership will alone convert it as between the representatives of the partners. 3 *Bro. C. C.* 199. *Belt’s ed.*, note. 7 *Ves.* 453. 9 *Ib.* 500. 11 *Ib.* 665, 2 *Dow.* 242. 1 *Swans.* 508, 521. *Roper’s Husb. & Wife*, 2d ed. 346, and *Mr. Jacob’s* note. The subject was men-

each other, though they *may* exchange, either together or separately, *with a stranger*.

But as the seisin of each is distinct, and their estates several, one may *enfeoff* the other; or, if the other have a greater estate, *surrender to him*. So one may *devise* his part to the other: but one cannot *release* to his companion, as such.* Gillb. Ten. 71.

Tenants in common may transfer their respective shares *to strangers* by the usual modes

tioned in the recent case of *Bligh v. Brent*, 2 *Yo. & Col.* 268: but the point decided was, that Chelsea Waterworks' shares are personal property.

Probably the following rule may be deduced from the cases cited: that the real estate purchased with the joint effects of the partnership will, as between the partners, be considered personal estate; and that the real estate would, with other joint property, be primarily liable to the payment of the joint partnership debts, as between the representatives; and that, if the heir or widow of a partner be entitled, their right can attach only on the surplus. Where real estate was purchased out of the partnership effects, and by the agreement of the partners was to be the separate property of one of them, to whom it was conveyed, he being considered the debtor to the partnership for the purchase-money, the wife was held entitled to dower out of the whole. *Smith v. Smith*, 5 *Ves.* 189. See 2 *Cru. Dig.* 409—10. Ed. 4.]

* Because such release must operate by way of enlargement, and there is no estate in the companion in the share of the releasor to be enlarged.

of conveying freehold property; and they may compel a partition among themselves.*

* Compulsory partitions are now usually affected by commissions out of Chancery, which are granted of right and perfected by reciprocal conveyances, by which means alone an amicable partition of all joint estates may be affected; and an agreement in writing to make a partition will have the same effect in equity. The commission is most common when there are particular estates and reversions in one or both moieties, as then all parties are bound by it, if it be made pursuant to the requisitions of the statutes 31 *H.* 8, *c.* 1, and 32 *H.* 8, *c.* 32. But the only mode of making an effectual partition where one of the parties is an infant is by the act of Parliament. [The recent act of 1 *W.* 4, *c.* 60, does not extend to cases of partition, sect. 18, where the infant is a trustee: the act, cap. 65, of the same session, provides for the case of a person having agreed to make partition and afterwards becoming lunatic, sect. 27; but it does not appear that it authorizes guardians on behalf of an infant to make partition.] Under the general inclosure act (41 *G.* 3, *c.* 109, *s.* 16,) the commissioners have power to allot in severalty all the old inclosures and new allotments held in joint-tenancy, coparcenary, or in common, within the parish, whether the parties are adult, infant, lunatic, or covert.

[By the 7 & 8 *Vict.* *c.* 76, *s.* 3, it is enacted, that no partition shall be valid *at law* unless the same shall be made by deed.]

But see *Gas-*
kell v. Gaskell,
6 *Sim.* 643.

OF A TENANCY BY ENTIRETIES.

WHERE an estate is during their coverture conveyed or devised to a man and his wife, they are said to be tenants by entireties, that is, each is said to be seised of the *whole estate*, and neither of a part. The consequence is, that the husband's conveyance alone will not have any effect against his wife surviving. The husband, being seised of the whole estate during coverture either in his own right or *jure uxoris*, can of course depart with that interest; but, to make a complete conveyance of all the interests held in entirety, the wife must concur; and, being under coverture, she must [before the operation of the statutes 3 & 4 *W.* 4, *c.* 74, and 4 & 5 *W.* 4, *c.* 92, have joined in a fine; and since those statutes she must concur with her husband in a deed of disposition acknowledged in conformity with the requirements of those acts.] Joint-tenants are seised *per my et per tout*. Tenants by entireties are seised *per tout* only. *Co. Litt.* 326. 3 *Co.* 27, b. 8 *Co.* 72. Under a joint-tenancy one moiety merely survives, the surviving joint-tenant being already seised of the other moiety. Under a tenancy by entireties there is in fact no survivorship, as the whole is in each tenant during coverture as much as it is in the survivor after it has ceased. The survivor takes the whole by original limitation, and not by the occurrence of a subsequent event. But although there is in fact no survivorship, the effect is, that the surviving husband or wife takes the whole estate, not as a new acquisition, but as an estate freed from participation by another. The consequence, it is presumed, is, that if the husband [even before the 1st of January 1838, made] his will and survived his wife, the will would be good without republication, which we have seen

1 *Vict. c.* 26.

would not be the case if he were a joint-tenant, *ante*, p. 163. And it should follow, that if tenants by entireties for their lives join in a conveyance to *A. B.*, he will take the whole for the life of the survivor; a point which has been so decided in *Doe v. Wilson*, *ante*, p. 170. This species of tenancy seems to be an exception to the rule that the husband and wife are one person in law; if they are to be considered as one person, the husband should be able to convey alone, which he is not enabled to do.

As a consequence of this peculiar tenancy, if a grant be made to three persons, two being husband and wife, the husband and wife take one moiety, and the stranger the other moiety, as between themselves they hold in joint-tenancy: but to enable the stranger to take by survivorship, he must survive both the husband and wife, so that he has one chance against two. The husband and wife hold their moiety as tenants by entireties; but though the husband has the freehold during coverture, he and the stranger cannot make a valid lease to bind the wife surviving; to effect *that*, she must concur. A gift to a man and woman who afterwards intermarry does not make them tenants by entireties. They are joint-tenants both before and after-marriage, and the husband alone may in that case create a severance by aliening his moiety; and it should be observed, that if a husband and wife hold a term for years as tenants by entireties, the husband alone may assign the term so as to bind his wife surviving. *Co. Litt.* 187, b. 356. 1 *Pres. Conv.* 55, 155. 2 *Abs.* 39; see Chapter, Husband and Wife, *infra in notis*.

3 & 4 *W.* 4,
c. 74, s. 77, &c.
4 & 5 *W.* 4,
c. 92, s. 68, &c.

CHAP. XIII.

OF A REMAINDER.

A REMAINDER* is that portion of interest which, on the creation of a particular estate, is *limited over to another*.

[* A remainder may exist in lands held for an estate of inheritance, and in lands held for an estate of freehold only. In chattels real and personal, a remainder, in the strict legal and technical sense of the word, cannot be limited. It was formerly considered that they were incapable of any limitation over, after a previous limitation of a partial interest; it is now established they are susceptible of such limitations over. On the limitations of chattels, see *Roper on Legacies*, vol. 2, 445, ed. 1828. The grantor of the fee simple may multiply the particular estates indefinitely; if by any assurance executed before or upon the 31st December 1833, the ultimate remnant of the estate is limited to his own right heirs, he is in of his former estate, and retains his old reversion; but if by assurance executed after that day, such a limitation by virtue of the statute 3 & 4 W. 4, c. 106, s. 3, confers upon the grantor a new estate by purchase: and he is not to be considered entitled thereto as of his former estate; but where no such limitation is made, it is conceived that the ultimate use, as a portion of the whole estate, results, as before the act to the grantor, and continues as his reversion in fee.]

2 Bl. Comm.
164. 1 *Fearne*,
[*Co. Litt.* 49, a.
143, a.]

See 3 *Atk.* 138.

Remainders are either *vested** or *contingent* : a *vested* remainder is that *which is limited, or is transmitted, to a person who is capable of receiving the possession should the particular estate happen to determine* ; as to *A.* for life, remainder to *B.* and his heirs : here, as *B.* is in existence, he is capable (or his heirs if he die) of taking the possession whenever *A.*'s death may occur.

A remainder is contingent† when *the particular*

[* An estate is *vested* when there is an immediate fixed right of present or future enjoyment. An estate is *vested in possession* when there exists a right of present enjoyment. An estate is vested in *interest* when there is a present fixed right of future enjoyment. An estate is *contingent* when a right of enjoyment is to accrue on an event which is dubious and uncertain. *Fearne's Rem.* 2.]

[Although it is enacted by the 7 & 8 *Vict. c.* 76, s. 8, that after the act comes into operation (1st *Jan.* 1845,) no estate in land shall be *created* by way of contingent remainder, but shall take effect as, and have the properties of an executory devise or estate ; yet, with respect to contingent remainders existing under instruments made before that time, the law remains as it was, with one important exception, that no contingent remainder shall fail or be destroyed, merely by the destruction of any preceding estate, or its determination by any other means than the natural effluxion of the time of the preceding estate, or some event on which it was in its creation limited to determine : the rules, therefore, which are discussed in the text and the notes on contingent remainders, must be read with reference to such existing remainders.]

[† *Fearne* defines a contingent remainder to be a remainder limited so as to depend on an event or condition which may

estate may happen to determine before the person to whom the remainder is limited can take the possession; as to *A.* for life, with remainder to the right heirs of *B.* Now, during *B.*'s life the remainder is *contingent*, as he cannot have an heir till his death; and, therefore, should *A.* die before *B.* there could be no one to take the possession.

In the creation of remainders the following rules were to be observed:— [7 & 8 Vict.
c. 76, s. 8.]

1st, There must be a present, or particular, *estate** created, which, if the remainder be a

never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate.

The student should be apprised that it is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, *if the possession were to become vacant*, and not the certainty that the possession *will* become vacant before the estate limited in remainder determines, distinguishes a vested remainder from one that is contingent. *Fearne's C. R.* 216.]

* Such estate, however, need not be in the actual seisin or possession of the particular tenant: it is sufficient that it confer a right to the possession, for while a right of entry remains, there can be no doubt that the same estate continues, since the right of entry subsists only in consequence of the existence of the *estate*; but when the right of entry is gone, and nothing but a right of action remains, it then

vested one, must be, at least, *for years*; or, if the remainder be *contingent*, must be an *estate of freehold*; as a freehold cannot commence *in futuro* by the common law.*

becomes a question in law whether the same estate continues or not, for the action is nothing more than the means of deciding this question. *Fearne*, 286, 7th ed. Hence an *interesse termini* should be a sufficient support to a vested remainder, as *that* is something more than a right of entry—being assignable. [But an *interesse termini* intervening between a prior term and the reversion will not prevent the merger of the term in the reversion when they unite in the same person in the same right. 4 *Mod.* 1. 5 *Barn. & Cress.* 111. *infra*, ch. LEASE, note (a). *Preston's Merger*, 120, ed. 3. 6 *Cru. Dig.* 470, 478, ed. 4.] An estate at will cannot support a freehold remainder, because entry to deliver seisin to the remainderman would be a determination of the will. *Dy.* 18, b. 5 *Bac. Abr.* 822.

* The student should distinctly mark the difference between a remainder commencing under a conveyance at common law, and a remainder commencing under a conveyance to uses. If a feoffment be made direct to *A.* for years, with remainder to *B.* in fee, livery is made to *A.* which instantly enures to *B.* The freehold passes out of the feoffor, and vests immediately in *B.*—This, therefore, is not an instance of the commencement of a freehold *in futuro*. But if the feoffment had been to *A.* for years, with remainder to the right heir of *B.* (*B.* being living,) there is no one in whom the freehold can vest. Livery may be made to *A.*, but as it cannot pass on to the remainderman, (he being unascertained,) nor be retained by *A.* himself (such a retention of the freehold being incompatible with his estate for years,) the livery operates nothing, and the freehold is not passed out of the feoffor, so that the feoffment is void as a

conveyance of the freehold; but being by deed under seal, it will enure as a good lease for the term. If, however, the feoffment had been to *A.* and his heirs, to the use of *B.* for years, with remainder to the use of the right heir of *C.*, here the whole seisin in fee passes out of the feoffor into *A.* the feoffee, and the statute executes the use in *B.* for the term of years; and then a resulting use arises to the feoffor and his heirs, till the contingent estate vests in the right heir of *C.* Such at least is the deduction from principle: but the cases do not go to the full extent of this position. At first sight, indeed, they appear contradictory (1 *Sand. Uses*, 142, 143, 4th ed.): but upon consideration it is submitted that they will be found not to oppose, if they do not support the doctrine here advanced. In *Adams v. Savage*, 2 *Lord Raym.* 854, the limitation of the term was to the [settlor himself for ninety-nine years, if he should so long live,] which negatived a resulting use to him of the fee; and in the case of a devise to *B.* for years, with remainder to the right heir of *B.*, this is a clear executory devise, and the fee in the interim, till the right heir is ascertained, descends to the testator's heir at law. *Harris v. Barnes*, 4 *Burr.* 2157. *Gore v. Gore*, 2 *Pr. Wms.* 28,) which is much the same case as the above limitation in a deed. In the event of a determination of the term pending the contingency, it is conceived that the contingent remainder would still be supported under the doctrine of resulting use; for if the term had not been limited, it is clear that the feoffor would have retained the fee till the contingency happened, and the introduction of a term cannot make any difference.

It is said in some books, that if the contingent remainder be for years, a particular estate for years will be sufficient to support it.—A little reflection will show that this observation is inapplicable to chattel interests. If a lease be made to *A.* for forty years if he shall so long live, and after his death to *B.* for one thousand years, *B.* takes an *interesse termini*, and not a remainder. *B.*'s term will take effect, although *A.*'s term should expire in his lifetime. They are two substantive

2dly, The particular estate and the remainders must be created *by the same deed*.*

3dly, The remainder must vest in the grantee

independent terms, which arise and take effect according to the periods of their limitation, without reference to each other. The second term does not require any particular estate to support it. The reason requiring a particular estate of freehold to support a contingent remainder in *fee* does not apply to a contingent remainder of a term, which may be made to commence *in futuro*. *Fearne's C. R.* 285, and see *Corbet v. Stone*, *T. Raym.* 140.

* A will and codicil, as they take effect at the same time, and are perfected by one and the same act, may be fairly denominated one and the same instrument. In *Hayes v. Foorde*, 2 *W. Black.* 698, an estate was devised to the heirs male of *J. S.*; and, in a schedule annexed to the will, the testator referred to the estate as being given to *J. S.* for life. The Court of King's Bench held that *J. S.* took an estate for life by implication, with which the limitation to his heirs coalesced, and gave him an estate in tail male, barrable by recovery, although the testator had attempted to make the estate tail inalienable. If an estate be conveyed to *A. B.* and his heirs, to the use of *C. D.* for life, with remainder to such uses as *E. F.* shall appoint, and *E. F.* appoints *G. H.* in fee, *G. H.* has a remainder dependent on the particular estate of *C. D.* *Fearne, C. R.* 74, 7th ed. But if an estate be devised to *C. D.* in fee, after next *Michaelmas*, the fee descends in the interim to the testator's heir at law, and *C. D.* [during that period has no vested estate, the whole fee vesting in the testator's heir until *Michaelmas*;] though some have thought that the heir takes an estate for a term with remainder to *C. D.* in fee. This construction, however, cannot be supported, as is ably shown by *Mr. Butler*, in his note to *Fearne's C. R.* p. 1.

during the particular estate, or the very instant it determines.*

4thly, And, if the remainder be contingent, it must be limited to some one that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the determination of the particular estate.†

2 H. Blackst.
358. Proctor
v. Bishop of
Bath & Wells.

* If an interval intervene between the determination of that estate and the vesting of the remainder, the remainder will be void,—*ab initio*, if the interval be certain at the time the remainder is created ; but *sub modo* only, if the interval occur at the time of the determination of the preceding interest. Thus, if an estate be granted to *A.* for life, with remainder after his death and *one day* to *B.* in fee, this remainder is void in its inception ; but if the grant be to *A.* for life, with remainder to *C.* after the deaths of *A.* and *B.*, this remainder is good in its limitation, but may become void in event. If at *A.*'s death *B.* be living, then, as the remainder cannot vest in *C.* till *B.*'s death, there will be an indefinite interval of time, during which the remainder to *C.* will have no particular estate to support it ; for want of that support the remainder will fall to the ground, by the first rule above-mentioned. *Et vide Mogg v. Mogg*, 1 Meriv. 654.

[It is conceived that the 8th section of the 7 & 8 Vict. c. 76, does not make any alteration in the four rules in the text, in reference to existing contingent remainders ; the last clause of that section merely prevents their tortious destruction, by annihilating the preceding estate.]

† In the case stated in the margin, *A.* devised an advowson to the first or other son of *B.* that should be bred a clergyman and be admitted to holy orders, in fee : but in case *B.* should have no such son, then to *C.* in fee. The Court was clearly of opinion that the devise to the son of *B.* was void,

By the feudal law, the freehold could not be vacant, or, as it was termed, *in abeyance*.

from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to *C.* was also void. This it will be observed is the case of an executory devise; but a contingent remainder must, it is conceived, be *in pari materid.* A contingent remainder, or shifting use, limited in the above words, would doubtless be held void, as tending to a perpetuity. No person can be admitted to holy orders till the age of twenty-three, so that in reality it is a limitation for life in being (namely *B.'s*), and at least twenty-three years afterwards, which is contrary to the general rule mentioned in the next Chapter.

If a condition be annexed to a particular estate, making it void in a given event, and an estate be limited to take effect on the destruction of the particular estate, that estate is not a remainder. It is a rule at common law, that a stranger shall not take advantage of a condition, but only the grantor or his heirs. This rule would be contravened, if the above mode of limiting a remainder were allowed: for the right of entry on a breach of the condition would in that case be in the remainderman, instead of the grantor or his heirs: besides, such a mode of limitation is incompatible with the nature of a remainder. A remainder, as the name imports, is an estate to fall into possession on the natural *determination*, not on the *destruction*, of the preceding estate. [An estate which is limited to commence on the destruction of the particular estate which immediately precedes it, is not a remainder; a remainder must either be vested or contingent, it cannot be a vested] remainder if it be to fall into possession on the destruction of the particular estate, the continuance of which is dependent on an event: nor can it be a *contingent* remainder, as it is certain of falling into being either upon the destruction *or* the determination of the preceding estate. The conclusion at common law is, that the

There must have been a tenant to fulfil the feudal duties or returns, and against whom the rights of others might be maintained.

condition is good, but the *remainder* void. The remainder, however, is supported by another name in conveyances to uses and last wills, as will be more fully explained in Chapter XV. on *Conditional Limitations*.

But if the condition for defeating the prior estate be to operate on one event, and the remainder be to arise on another and totally different event, the remainder will not be void; but the particular estate will be discharged of the condition, and the remainder held good: in other words, the condition will be void, and the particular estate become absolute for the time it is granted. The condition being on one event, and the remainder on another, the grantor has, by the limitation of the remainder, put it out of his power to take advantage of a breach of the condition by entry or claim. To allow him to enter under the condition, would enable him to defeat a good remainder and derogate from his own grant; and it is unreasonable that the grantor should defeat that estate in remainder which he had absolutely given away. Indeed, it seems directly within the reason of the common law case put by *Littleton* before the stat. of *H. 8*, that if a man lease for life, upon condition of re-entry for non-payment of rent, and the lessor afterwards grants away his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion; *Litt. s. 347, Perk. s. 831*: so in the above case the lessor, by limiting the remainder over absolutely, has departed with the reversion as much as if he had afterwards aliened it by another conveyance. In this case, therefore, the condition is void and the remainder good.

By way of exemplification:—If a feoffment is made to *A.* a widow, for life, provided that if she marry again, then her estate to cease, and immediately after her death or *second marriage* the estate to enure to *B.* in fee: [this limitation to

If the tenancy once became vacant, though but for an instant, the lord was warranted in entering on the lands, as the consideration on the part of the tenant had ceased ; and, consequently, as no returns were made, there being no one to render the services of the feud, the lord was entitled to resume it. The tenant can only subject his own estate to his own limitations ; and, therefore, the moment that estate ended, by the cession of the tenancy, all limitations of that estate were also at an end.

The lord, on the escheat, is in, paramount the tenant ; he is in, of an estate from which the tenant's was originally derived.

B. according to the event, will take effect either as a conditional limitation or a remainder ; if *B.* marries, it will take effect as a conditional limitation, but if she does not, as a remainder : had the limitation to *B.*] been introduced without the words in italics, then it would have been a good remainder, and the condition would be viewed as surplusage, *Fearne*, 270. So, if the limitation had been to the widow *durante viduitate*, the remainder would have been good : and as then her death or second marriage would have been the natural period for the determination of her estate. [A contingency sometimes is said to have a double aspect, as where there are two contingent remainders in an alternative, which provides for the happening and non-happening of a contingent event : thus a devise to *A.* for life, and if she shall have issue male living at her decease, to such issue male as tenants in common in fee ; but if she shall die without having issue male living at her decease then to *B.* in fee. See also *Goodtitle v. Billington*, *Doug.* 725. *Fearne's C. R.* ch. 2, s. 6.]

Hence, then, the necessity of an immediate estate of freehold, or of a freehold in possession, being vested in some person actually in existence who may fulfil the duties of the feud, and who may answer to the *præcipe* of strangers; and hence the necessity also of the remainder taking effect during the existence of such particular estate or *eo instanti* that it determine; as a limitation of an estate cannot take place where that estate itself is no more.

A *vested* remainder may be conveyed to another by grant, by lease and release, by bargain and sale enrolled, or the remainderman may covenant to stand seised; [and before fines were abolished by the stat. 3 & 4 W. 4, c. 74, as to lands in *England*, and the 4 & 5 W. 4, c. 92, as to lands in *Ireland*, it might be conveyed by fine.]

But it cannot be granted to commence *in futuro*; for the law does not permit a person to *reserve* to himself a less estate than he had before.* And

Co. Litt. 270,
a. n. (3), (261),
b. n. (1) *Sand.*
on Uses, 332.
455.

See *Plowd.*
155, b. 197, b.
8 *Co.* 74, b.

Vide post, b. 2,
c. 1. Of a
Feoffment.

* Every particular estate is considered less than the remainder, and here the remainderman does in fact reserve to himself a particular estate, as the legal interest in the land remains in him *until* the future period arrives. If the grant be to uses, the whole fee results to the grantor; and consequently, in a conveyance of that character, a remainder may be granted *in futuro* by way of shifting use, as the grantor does not obtain a less, but an equal estate, by the grant. Thus, if a remainderman convey to *A.* and his heirs, to the use of *B.* in fee after next *Christmas*, till next *Christmas* the

Vide post, b. 2.
Of a recovery.

14 *Geo.* 2, c. 20.

as the freehold is in the particular tenant, a remainder cannot be the subject of a *feoffment*; for a feoffment operates on the possession which the remainderman has not to convey.* For the same reason a *recovery* could not be suffered of a remainder, as the *præcipe* could only be brought against *the tenant of the freehold in possession*. But, if a *præcipe* were brought against the tenant in possession, and the remainderman were vouched and entered into the warranty, he would then be bound.†

whole use results to the remainderman in fee; he does not take a particular estate till *Christmas*, with remainder to *C.*, but the whole use results to him for an estate in fee, and *C.* takes nothing till *Christmas* arrives. The remainderman does not, therefore, reserve to himself a less, but an equivalent estate to the one he had before. If, however, the grant had been directly to *C.* in fee after next *Christmas*, then, as no estate would pass to him immediately, nor to any other person in the interval, the remainder is not taken out of the grantor; and, consequently, the conveyance operates nothing, and is therefore void, which would be its effect whether the subject of it were in possession or remainder; and therefore it is true, that at *common law* a remainder cannot be granted to commence *in futuro*, not so much on the reason assigned in the text, as upon the invalidity of the grant.

* Hence remainders are said to lie in *grant*, which was the mode of conveyance, at common law, of those estates which did not lie in livery, or of which livery could not be given.—
Note by Mr. WATKINS.

† And the remainderman might levy a fine of his estate in remainder; which, however, did not affect the possession. *Roe v. Elliott*, 1 *Barn. & Ald.* 85.

A contingent remainder [might previously to the statute 3 & 4 W. 4, c. 74, as to lands in *England*, and to the statute 4 & 5 W. 4, c. 92, as to lands in *Ireland*] be barred by *estoppel* by matter of record, as a fine* or recovery;† and

Fearne, C. R.
365. *Sand.* 335.
[*Doe v. Tom-*
kinson, 2 *Maule*
& *Sel.* 165.
Doe v. Martin,
8 *Bar.* & *Cress.*
497. 10 *Ib.*
181.]

* A vested remainder could not be barred by the direct operation of a fine, but by five years' nonclaim on a fine it might. The learned author, however, is not here alluding to fines levied by other persons, but to fines levied by the owner of the remainder. A fine might be levied of a vested remainder, and its effect was, to pass or convey the estate, [and, if an estate tail, to bar the issue in tail]; but a fine of a contingent remainder operated to destroy the remainder and accelerate the reversion. *Weale v. Lower*, *Poll.* 54. The Courts, however, seem disposed to question this effect of a fine at the present day. *Davies v. Bush*, 1 *M. Cl. & Yo.* 58.

[It is submitted that the case of *Davies v. Bush* cited in the preceding note by *Mr. Coventry*, does not countenance the general proposition, that a fine would not bar a contingent remainder and accelerate the reversion. That case in conformity with *Jersey v. Deane*, 5 *Barn. & Ald.* 569, and other authorities, establishes the following conclusion, that where the parties levying a fine, by a contemporaneous deed, declared the uses for a specific purpose, there, although the legal effect of the fine unexplained and uncontrolled, would be to destroy and extinguish contingent estates, powers, and other interests in the parties levying it, yet that its nature was not so inflexible but that it would bend to and be controlled by the intention; and consequently (the fine and deed of declaration being taken together as one assurance) that the operation of the fine should be so restrained and regulated as to effectuate the real object of the parties to the transaction.]

† But although a recovery barred the person suffering it by *estoppel*, yet the issue in tail (supposing the contingent

if the contingent remainder is such as to be descendible to the heirs of the person to whom limited, if he die before the contingency happen, [it might even before the 1 *Vict. c. 26*, have been devised, and before the 7 & 8 *Vict. c. 76, s. 5*, have been] *passed in equity*, but not otherwise;* [except as to lands in *Ireland*; for by the 22nd section of the statute 4 & 5 *W. 4, c. 92*, power is given to persons (not being expectant heirs of living persons) entitled to estates not vested, to dispose of them by deed or will, in the same manner as if they were vested.]

remainder to be in tail) were not barred by a recovery suffered by their ancestor, while the remainder was in an executory state. It has indeed been questioned, whether such an act by the contingent remainderman did not destroy the remainder. This is conceded, if the remainder were in fee, where the heirs claimed in the *per*; but being in tail, it is difficult to say, that the issue who claim *per formam doni*, paramount the person suffering the recovery, would be bound by it in the event of that person's death pending the contingency.

* The meaning of this passage is, that a contract by an adult for sale of his contingent remainder in fee for valuable consideration, will be decreed to be specifically performed in equity, both as against himself and his heir, either in his lifetime or after his death, whether the contingency has happened or not, and whether it be in remainder or possession. Hence, a written agreement for purchase, and proof of payment of the consideration-money, seems to be all that was requisite for the conveyance of a contingent remainder while it is executory.

[But now by the 5th section of the 7 & 8 *Vict. c. 76*, which extends to all parts of the United Kingdom except *Scotland* (that being expressly excepted), any person may convey by deed any contingent or executory interest, right of entry, or other future estate or interest in freehold, copyhold, leasehold or personal property, so that the person to whom the conveyance is made shall stand in the place of the party conveying; but an expectancy of the heir or next of kin of a living person, or an estate tail are not within the above provisions; neither can a *chose in action* be thereby conveyed *at law*.]

[Previously to the above statute,] contingent remainders might have been destroyed, and prevented from taking effect, by destroying the particular estate by which they were supported;* and, therefore, it was frequently necessary to

* This destruction might have been effected by the merger, surrender, or forfeiture of the particular estate. [Before the 7 & 8 *Vict. c. 76*,] if the particular tenant attempted to convey a larger estate than he could warrant, by an instrument which operated to divest the estates of the remaindermen, as a feoffment, [or before the late statutes 3 & 4 *W. 4, c. 74*, as to lands in *England*, and the 4 & 5 *W. 4, c. 92*, as to lands in *Ireland*, a fine, or recovery], he, by that act, disclaimed the tenancy of his estate for life, and usurped the fee; the effect was an immediate and complete forfeiture of his estate for life to the next vested remainderman. But a lease and release, being an innocent assurance, passed no more than the releasor could convey. Such an assurance therefore by a tenant for

Sup. 161.

Vide ante, c. 8.
 [Hasker v. Sutton, 1 Bing.
 500. Doe v.
 Howell, 10 Bar.
 & Cress. 191.]

limit the legal estate to trustees for the purpose of preserving them.*

life of an estate in fee conveyed no more than his particular estate for life; and although that estate was by this means converted into an estate *pour autre vie*, yet the particular estate not being forfeited or destroyed by the release, but only passed, the privity between it and the remainder continued, and consequently the contingent remainder was well supported by the estate of the releasee. [But now by the 7th section of the 7 & 8 Vict. c. 76, no assurance can create an estate by wrong; the feoffment therefore is now deprived of the particular operation above mentioned].

* In limitations in strict settlement, the estate of the trustees to preserve contingent remainders should have been carefully confined to the life of the particular tenant. The limitation should run thus:--To A., for life, with remainder to B. and his heirs *during the life of A.*, with remainder to his first and other sons, &c. If the words in italics be omitted, the trustees take the fee; and as a fee cannot be limited on a fee, the succeeding limitations are invalid at law, but in equity they are supported as trusts. If, however, a term to raise portions or otherwise were afterwards given to the same trustees by the same settlement, or a power to lease during minority were reserved to them, or any other limitation be added clearly incompatible with the existence of the fee in the trustees, they were held to take an estate for the life of the tenant for life only, although the words might be *large* enough to give them the fee. *Curtis v. Price*, 12 Ves. 89. [See also upon the subject of this note *Venables v. Morris*, 7 T. R. 342. *Doe v. Hicks*, *ib.* 433. *Colmore v. Tyndall*, 2 Yo. & Jer. 605. Sometimes it was proper to vest the whole legal fee in the trustees to support contingent interests of children, who at the determination of the preceding estate either might not be *in esse*, or might not answer the required character; as where an estate was devised to and to the use

[But now by the 8th section of the above statute contingent remainders cannot be created ; and with respect to those existing when the act came into operation (1st January, 1845), they cannot be barred or destroyed merely by the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was, in its creation, limited to determine.]

If it be intended in a settlement to prevent the parent, from whom the lands move, from defeating a remainder limited to his heirs general or special,—care must be taken that no particular estate be limited, or be capable of resulting, to

1 *Fearne*, 49.
2 *W. Bl. Rep.*
687. *Wills &*
Palmer.

of trustees upon trust for *A.* for life, and after her death, for such of her children as should attain twenty-one as tenants in common in fee : there if *A.* left her children minors at her death, their estates would be supported by the legal fee in the trustees. *Hopkins v. Hopkins*, *Ca. tem. Tal.* 44 ; *Fearne's C. R. ch.* 3, s. 8. *Duffield v. D.*, 1 *Dow & Cl.* 268, 396, 403. Had the limitation been to the trustees and their heirs to the use of *A.* for life, with remainder to the use of such of her children as should attain twenty-one, &c., upon her death the contingent remainders to her infant children would be defeated. *Festing v. Allen*, *Mee. & Wel.* 10, Nov. 1843. 12 *Mee. & Wel.* 279.

But in instruments made after the 1st Jan. 1845, such a limitation would be construed as an executory devise, and not a contingent remainder, 7 & 8 *Vict. c.* 76, s. 8.]

such parent ; as the estates would, in such case, unite, and the parent have an estate in fee or in tail in himself.*

* When a feoffment is made to *A.* and his heirs, to the use of the heirs of the body of the grantor, the use resulting to the grantor for his life by way of particular estate, the grantor, by the union of the particular estate and the remainder, becomes tenant in tail in possession. 1 *Roll. Rep.* 240. *Freem. Ch. Ca.* 235, by *Hovenden*. This decision is formed on the true construction of the Statute of Uses, viz., that so much of the use as the grantor has not disposed of, and no more, results to him. 1 *Sand. Uses*, 138.

[*Mr. Fearne* enumerates four classes of contingent remainders:—*First*, Where the remainder depends entirely on a contingent determination of the preceding estate itself: as if *A.* makes a feoffment to the use of *B.* till *C.* returns from Rome, and after such return of *C.* then to remain over in fee.

Secondly, Where some uncertain event, unconnected with, and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder: As if a lease be made to *A.* for life, remainder to *B.* for life; and if *B.* die before *A.*, remainder to *C.* for life: here the event of *B.*'s dying before *A.* does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to *C.*'s remainder: such event is dubious, it may or may not happen, and is therefore contingent.

Thirdly, Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate: as if a lease be made to *I. S.* for life, and after the death of *I. D.* to *C.*

Fourthly, Where a remainder is limited to a person not ascertained or not in being at the time when such limitation

is made ; as if a lease be made to one for life, remainder to the right heirs of *I. S.* he being alive.

It may be useful to the student to consider the operation of the 7 & 8 *Vict. c. 76, s. 8*, upon the four preceding classes of contingent remainders, should they occur in instruments made on or after the 1st of *January*, 1845, from which period they will be converted, if in a will, into executory devises, and, if in a deed, into executory limitations in the nature and having the properties of executory devises. It will be found that the *first* class only will have the same effect since, as before the statute, but that the three remaining classes will undergo a material change. In the latter the executory devise or limitation must not only await the determination of the preceding estate, but also the happening of the contingency, which may not take place until after the expiration of the previous estate. Thus for example in the *second* class, in a devise or limitation to *A.* for life, and if *B.* returns from Rome to *C.* in fee ; *B.* may not return from Rome in *A.*'s lifetime ; but as that event must precede the vesting of the ulterior limitation to *C.*, it may after *A.*'s death be kept in suspense, for the period of *B.*'s life, to await his return from Rome. In the example by which *Fearne* illustrates his second class, it happens that the estate of *C.* will take effect, as it would have done before the statute, but that arises from the accidental circumstance of making the collateral event, the determination of one or other of the preceding estates which are to introduce the ulterior limitation ; the editor therefore prefers, the example he has given of *B.*'s coming from Rome, as a less ambiguous illustration. In the *third* class, also, the statute has effected a change ; for at the death of *I. S.*, *I. D.* may be living, and the ulterior limitation must, in that event, await the period of *I. D.*'s death. So also in the *fourth* class, the tenant for life may die while *I. S.* is living, and, therefore, the limitation to the heir of *I. S.* must remain in contingency during his life. It is conceived that in all the three latter classes the fee results, during the

interval between the determination of the preceding estate and the suspense of the contingency. It will occur to the learned reader that limitations falling under some of the above classes, when in a will, may require a very different construction from that which they would receive in a deed.]

CROSS REMAINDERS.

GIFTS, with cross remainders, are grounded on a tenancy in common. Under a gift to *A. B. and C.* as tenants in common in tail and in default of the issue of either of them, then to the other or others of them as tenants in common in tail, and in default of issue of all of them, then to a stranger in fee : *A. B. and C.* are tenants in common of one-third each in possession, with remainder as to *A.*, to *B. and C.* as tenants in common in tail, with remainder as to *B.*, to *C.* in tail, and with remainder as to *C.*, to *B.* in tail, and so reciprocally as to the other two-thirds. In deeds, cross remainders cannot arise without express words. But in wills, marriage articles, and limitations of executory trusts, they may be implied. The reason why cross remainders cannot be implied in deeds is, that although in a deed the *remainder* may be implied, yet *words of inheritance* cannot be implied so as to determine what quantity of estate is conferred by the remainder. *Nevell v. Nevell*, 1 *Rol. Abr.* 837. R. pl. 2. Mr. *Serjeant Williams*, in a note to *Cook v. Gerrard*, 1 *Saund.* 185, (in which many of the cases relating to cross remainders are collected and arranged,) observes, that the reason of the rule may be found in the above extract from *Rol. Abr.*, viz. that by way of use an estate tail cannot be raised without the word "heirs." In fact, the words of inheritance are the only part of the intention of the parties which cannot be implied ; therefore, if no particular words were necessary to limit the inheritance, cross remainders could be raised by implication in a deed as well as in a will. See also *Cole v. Levingston*, 1 *Vent.* 224. *Doe v. Worsely*, 1 *East*, 430. *Doe v. Wainewright*, 5 *T. R.* 428. [*Meyrick v. Whishaw*, 2 *B. & Ald.* 810. *Levin v. Weatherall*, 1 *Brod. & Bing.* 401. *Edwards v. Alliston*, 4 *Russ.* 78.]

Wills are construed upon the intention. If lands are devised to two persons, provided that if they die without issue, then over; if one of them dies without issue, and the other dies leaving issue, a question arises whether the moiety of the former is to go over to the remainderman when the words of gift are, that the estate shall not go over to him till the death of *both* the devisees without issue. To prevent an abeyance the law implies cross remainders between the devisees; on which construction, the one who has issue will take the whole on the death of the other without issue, and this to meet the manifest intention of testators. But the estate implied must always be an estate tail, and therefore if the words will not admit of the implication of that estate, cross remainders cannot arise.

The old rule was, that cross remainders could not be implied between more than two devisees; but it is now fully settled that cross remainders may be implied between any number of devisees, if the circumstances will warrant the implication. The rule is thus laid down by *Lord Mansfield*: Between *two*, the presumption is in *favour* of cross remainders, between *more than two*, the presumption is *against* them; but in either case the intention of the testator may control the presumption." *Doe v. Burville*, *Lofft*. 101. 2 *East*, 47. *Wright v. Holford*, *Cowp*. 31. *Phipard v. Mansfield*, *Ibid*. 797. *Atherton v. Pye*, 4 *T. R.* 710. *Watson v. Foxon*, 2 *East*, 36. *Roe v. Clayton*, 6 *East*, 634. *Doe v. Webb*, 1 *Taunt*. 234. *Green v. Stephens*, 12 *Ves*. 419, and *S. C.* 17 *Ves*. 64. *Mogg v. Mogg*, 1 *Meriv*. 655. *Horne v. Barton*, 19 *Ves*. 398.

A tenant in tail, with cross remainders over, might by common recovery, [and now that recoveries are abolished, he may by a deed of disposition in conformity with the statute of 3 & 4 *W.* 4, c. 74, as to lands in *England*, and the 4 & 5 *W.* 4, c. 92, as to lands in *Ireland*,] convey his own purparty of the estate in fee. But he could not alone, by recovery, convey his remainders in the shares of his companions; for having no estate of freehold in possession in those shares, he

could not make a tenant to the *præcipe*. However, by levying a fine with proclamations he might convey all his estates in remainder, for his issue could never claim in opposition to his fine ; and if he covenanted to suffer a recovery of those remainders when they came into his possession, a purchaser from him would have as effectual an assurance as the nature of the case would admit.

[A tenant in tail in remainder may, by deed of disposition in conformity with the above acts, without the consent of the protector (if there be one), convey a base fee to continue so long as there shall be issue inheritable under the entail, and so as to bar all persons claiming under the entail : and, with the consent of such protector, he may not only bar the issue in tail, but all estates and interests expectant or depending upon the estate tail, of course, leaving unaffected all estates prior to his estate tail. If there is no such protector, the disposition by the tenant in tail in remainder will, it is conceived, bar his estate tail, and all remainders, &c. depending upon it. So that if lands are limited to *A.* in tail, remainder to *B.* in tail, with remainders over, there not being a protector, the disposition by *B.* will have the effect above-mentioned. That *A.*, the tenant in tail in possession, is not a protector, in reference to the remainder in tail to *B.* appears settled from the decisions of *Lords Brougham and Lyndhurst*, in *Re Blewitt*, 3 *Myl. & K.* 250 ; see also *Wood in Re*, 3 *Myl. & Cr.* 266.]

Sec. 34. E.
— 32. I.

CHAP. XIV.

OF AN EXECUTORY DEVISE.

AN executory devise [previously to the statute 7 & 8 Vict. c. 76] differed from a remainder (among other things) in this, that a remainder *must have had a particular estate to support it*, while it is essential to an executory devise that *no particular estate be in existence*; it having been a rule, that that shall never be construed an executory devise which can be supported as a remainder.* [But now by the 8th section of

2 Bl. Comm.
179. *Fearne*,
Ex. Dev. 416,
ed. 8.
2 Saund. Rep.
388. *Purefoy*
v. *Rogers*.

* The five distinctions deducible from *Mr. Fearne's* book on the subject are the following:—

An executory devise differs from a contingent remainder:—

- 1st, Because an executory devise is admitted only in last wills and testaments.
 - 2ndly, Because an executory devise respects personal estate as well as real.
 - 3rdly, Because an executory devise requires no preceding estate to support it.
 - 4thly, Because when any estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines.
- And,

the above statute contingent remainders cannot be created by deed or will; but in all instruments made upon or after the 1st of *January*, 1845, they will take effect as executory devises, if in a will, and executory limitations, in the nature and with the properties of executory devises, in a deed.]

5thly, Because an executory devise cannot be prevented, or destroyed, by any alteration whatsoever in the estate out of which or after which it is limited.

Thus, if a testator devise to *A.* and his heirs, but if *A.* should die without issue in the lifetime of *B.*, then to *B.*, and his heirs; in this case, *A.* cannot bar the limitation over to *B.*—The fifth position, however, requires this qualification, that if the executory devise be limited to take effect on an estate tail, then the tenant in tail may by [a deed of disposition in conformity with the stat. 3 & 4 *W.* 4, c. 74, and 4 & 5 *W.* 4, c. 92,] bar the entail, and all remainders, executory devises, and conditional limitations dependent thereupon. If the executory devise is expectant on an estate in fee, then, as the position intimates, there are no means of preventing its taking effect if the event happens on which it is to arise. But though executory devises are admitted in last wills and testaments only, yet in deeds taking effect by the Statute of Uses, limitations tantamount to executory devises are allowed under the denominations of conditional limitations and contingent springing or shifting uses.

[It may be here noticed, that the fifth position before stated is, by the above statute of the 7 & 8 *Vict.* c. 76, equally applicable to contingent remainders existing under instruments made before the 1st of *January*, 1845.]

See as to the accumulation of profits, *stat.* 40 *Geo.* 3, c. 98.

By executory devise a fee or less estate may be limited after a fee, either absolute or base; so it be to take effect in possession within a life or lives in being, or within twenty-one years afterwards.*

[*Cole v. Sewell*, 2 *Con. & Law*. 359, per *Sir E. Sugden*.]

See 4 *Cruise's Dig.* p. 349, ed. 4.

* The rule against perpetuities does not apply to remainders: 1st, because every remainder which is contingent must vest in interest during the continuance of the particular estate or the very instant it determines; and, 2ndly, because the owner of every vested remainder [being an estate of inheritance, and which must be an estate tail if there are remainders over,] has the power, when in possession, of barring all subsequent remainders. Hence a limitation to *A.* for life, with remainder to the first son of *B.* in tail, does not create a perpetuity; because, although it may be more than twenty-one years after the death of *A.* that *B.* has a son, yet, on *A.*'s death it is ascertained whether the estate is to go according to the limitation, or whether it shall revert to the settlor or his heir. So in the instance of a limitation to *A.* for life, with remainder to the first son of *B.* and the heirs of his body, and after failure of such issue to *C.* for life, with remainder to his first son and the heirs of his body, with like remainders over,—this does not create a perpetuity in the eye of the law, although it may prove in event that there is not a failure of the issue of the first tenant in tail till one hundred years after the date of the conveyance; for as each successive tenant in tail, when of age, has the power to bar the entail and remainders over, the estate cannot be *certainly* inalienable for a longer period than twenty-one years after the death of a life in being. It may happen that *B.*'s eldest son shall marry and die before twenty-one, leaving issue, by which means the estate would be tied up for another minority (except released by act of Parliament); yet, as this event is not certain, and is an act of Providence rather than of the party, the rule is

Or a fee may be limited to commence *in futuro*; as, till such fee take effect, the in-

not transgressed by this limitation in its inception. Hence [8 *Jurist*, 22. 283.] it is apparent, that the fee cannot, by way of remainder, be without an owner for a longer period than a life in being.

By executory devise the rule is clearly established as above stated. It arose from the usual practice of settling real estates to the husband for life, with remainder to his sons successively in tail: which being allowed, renders the estate inalienable during the existence of a life in being, and twenty-one years after; that is, till the son of the tenant for life attains his full age. From one life the Courts gradually proceeded to several lives in being at the same time; for this in fact only amounted to the life of the survivor: and as it might happen that a tenant for life, to whose unborn son an estate tail was limited, might die, leaving his wife *enceinte*, an allowance was also made for the time of gestation of a posthumous son; and, therefore, it is commonly laid down as a general rule, that an estate may be rendered inalienable during the existence of a life, or of any number of lives in being, and nine months and twenty-one years after. Some writers add another period of nine months at the end of the twenty-one years, as an infant tenant in tail might marry and die, leaving his wife pregnant; but the minority of the second posthumous son may with as much propriety be added, as this second period of gestation; and as the same casualty may happen to the grandson, the estate may in event become inalienable for an indefinite period of time. It is obviously incorrect even to say, that an estate may be tied up for a life or lives in being, and *nine months* and twenty-one years after by the *original limitation*, for the nine months are dependent on a very uncommon event. [It does not appear to have been settled previously to the case of *Bengough v. Edridge*, 1 *Sim.* 173, that] the twenty-one years could by original limitation be made a separate independent term, during which the estate should

be inalienable, or whether the period after the life in being must be measured by the minority of the next taker. In *Beard v. Westcott*, 5 *Barn. & Ald.* 805, the Judges delivered no express opinion on the point. In the Court of Common Pleas, on a former stage of the same case, this question was separately argued; and the Judges there decided, that the term of twenty-one years might be a term in gross, without reference to infancy. [The case came on again before *Lord Eldon*, C. for further directions. It was contended that the Court of K. B. in the certificate (5 *Barn. & Ald.* 805) had not returned a sufficient answer to the case; and that it could not be collected from their certificate, whether the circumstance that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void; on the other hand it was insisted that the conclusion to which the Court of K. B. had come involved the decision of the point: and of this opinion was *Lord Eldon*, who observed, that it was impossible the Court of K. B. should not have considered that point; the certificate appeared to his Lordship to afford a substantial answer to the questions put. His Lordship confirmed the certificate of the Judges of the Court of K. B., the inclination of his opinion being that they were right. 1 *Turn. & Russ.* 25. But in *Bengough v. Edridge*, the point was expressly decided by *Sir John Leach*, M. R., that a limitation after an absolute term of twenty-one years, and a life or lives in being is valid. His Honor then observed, that although the rule of law was framed by analogy to the case of a strict settlement, where the period of twenty-one years was allowed in respect of the infancy of the tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being. This decision was confirmed on appeal by the House of Lords, under the name of *Cadell v. Palmer*, 10 *Bing.* 140; 1 *Cl. & Fin.* 372.] See, on the

subject of perpetuities, and restraints on alienation, 2 *Ves. & Bea.* 61. *Beard v. Westcott*, 5 *Taunt.* 393, *S. C.*; 5 *Barn. & Ald.* 801; 4 *Ves.* 337; 1 *Turn. & Russ.* 25.

It was once doubted, whether an estate for life could be limited to a person *unborn*; but it is now settled, that such a limitation is valid. In *Hay v. Coventry*, a testator devised an estate to an unmarried man for life, with remainder to his first and other sons in tail, with remainder to all and every his daughters, equally to be divided between them; but he forgot to add words of inheritance to the limitation to the daughters. An only daughter of *A.*, born after the testator's death, was held to take an estate for life. 3 *T. R.* 83. But an estate cannot be limited to the *issue of a person unborn* to take by *purchase*: such a gift involves three lives (the father, son, and grandson), while only one life (the father) is in being; and though there is a possibility that the rule against perpetuities may not be contravened by this limitation, as it may happen that the tenant for life shall have both a son and a grandson born in his lifetime or within twenty-one years after his death; yet, as the devise tends so strongly to a *potentia remotissima*, the Courts have held it void on the tendency which it has to a perpetuity; but where there is nothing on the face of the will to interfere with such a construction, the Courts have, under the doctrine of *cy-près*, given the son (when born) an estate tail—that, in general, being found the best to coincide with the intention of the testator. Thus, in *Humberston v. Humberston*, 1 *P. Wms.* 332, a testator gave his estate to the Drapers' Company and their successors, in trust to convey the said estates to his godson, *A.*, for life, and afterwards to *his* first son for life, and so to the first son of that first son for life, and *in failure of such issue*, over. Lord Chancellor Cowper held, that although these limitations tended to a perpetuity, and were therefore void; yet, that the intent of the party might prevail as far as the rules of law would allow, he decreed that all the devisees in being should take estates for life; but that the limitation to the sons unborn should be in tail.—The words

in italics in the above devise contributed no doubt in a great measure, to produce this decree. In a late case, a testator devised real estate to two trustees, until some son of *Major Le Hunt* should attain twenty-one; and then the testator gave the same real estate to such son for life, with remainder to his first and other sons in strict settlement, and so on to every son of the said *Major Le Hunt*, with remainder to the right heirs of *A. B.* The Court of King's Bench certified, that the eldest son of *Major Le Hunt*, having attained twenty-one years, took an estate tail in the subject of devise. *Le Hunt v. Hobson, K. B., Easter Term, 1326.* If a devise be void for a perpetuity, all the devisees over are likewise void. The Court of Common Pleas, however, held otherwise in *Beard v. Westcott, 5 Taunt. 393*; but that adjudication has lately been overruled by the Court of King's Bench, *5 Barn. & Ald. 801. 1 Turn. & Russ. 25.* There a person devised to trustees, in trust to pay the rents to his grandson *A.*, who was unmarried at the testator's death, for ninety-nine years if he should so long live, and after his death to his first son, for ninety-nine years in like manner, and [so on in tail male to such first son lawfully issuing for ever;] but if *A.* should die without issue, male, or should have issue male, and such issue should die under the age of majority, then to *B.* absolutely: the Court of Common Pleas held, that the executory devise over to *B.* was good. *5 Taunt. 407.* But the case being again lately argued in the Court of King's Bench, the Judges there held, that the devise to *B.* was absolutely void. *5 Barn. & Ald. 801.* Thus much for the limitation of the *corpus* of an estate in perpetuity.

As to trusts for the accumulation of the rents and profits, it is enacted by *Thelluson's Act (39 & 40 G. 3, c. 98.)* that no person, after the passing of that act (*28 July, 1800.*) shall, by any deed or will, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than (1) the life or lives of any such

grantor [or grantors, settlor or settlors; or (2)] the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or (3) during the minority of any person or persons living, or *en ventre sa mère*, at the time of the death of such grantor, devisor, or testator; or (4) during the minority of any person or persons who, under the uses or trusts of the deed or will, would, if of full age, be entitled to the rents or annual produce so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents and produce shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to such person or persons as would have been entitled thereto, if such accumulation had not been directed. Sect. 1.

Upon this statute it has been decided, that a disposition for an accumulation for a longer period than the act allows, is valid for the time allowed, and only void for the excess. *Griffiths v. Vere*, 9 *Ves.* 127. *Longdon v. Simson*, 12 *Ves.* 295. [*Eyre v. Marsden*, 2 *Keene*, 564, affirmed 4 *Myl. & Cr.* 231. *Elborne v. Goode*, 8 *Jurist*, 1001. For where the trust is incapable of modification, it is void altogether. See *Lord Southampton v. Marquis of Hertford*, 2 *Ves. & B.* 54. *Marshall v. Holloway*, 2 *Swan.* 432.] But such excess must be clearly distinguishable from the valid part of the disposition, though it need not *follow*, but may, if clearly distinguishable, precede the sound part of the trust.

[In *Lombe v. Stoughton*, 12 *Sim.* 304, a sum of money was bequeathed to trustees to be applied in erecting a mansion, and in the mean time to be invested in the funds, and the dividends to accumulate; the principal with the accumulations to be applied for the above purpose, and the surplus to be laid out in land to be settled to the uses of the devised estate. From circumstances, the mansion had not been built, and the fund had accumulated for 21 years. *Sir L. Shadwell*, V. C., held the accumulation not within the meaning of the 39 & 40 *Geo. 3, c. 98.*]

heritance shall descend to the right heirs of the testator.*

Harg. n. (5)
to *Co. Litt. 20,*
a. *Fearne,*
E. D. passim.

Remainders (or at least what we may here call remainders) of chattels, either real or personal, may be limited by executory devise, so they be limited to a person or persons in being, or to vest within twenty-one years after the death of a person or persons in being; but if the remainder be such as, if it were of freehold property, would amount to an express entail, it shall rest in the person in whom it so vests, and be at

Vide ante, c. 2.

* And although the executory devise is dependent on the arrival of a future period only, and not on a contingent event, so that the executory devise is sure to take effect on the day appointed, yet the heir will take the whole fee in the interim, and not merely a term, bounded by the ascertained continuance of his estate. Thus, if *A.* devised land to *C.* and his heirs from the 1st day of *January* next after the testator's decease, the fee will descend to the heir at law of *A.* till the 1st day of *January*, when the executory devise will operate, and carry the fee simple to *C.* in possession. Till the arrival of the day, *C.* has not any estate in the land, [although he has an interest transferrable and devisable.] In the language of *Mr. Butler*, "he has not an estate in *possession*, as he has not a right of present enjoyment; he has not an interest in *remainder*, as the limitation to him depends on the estate in fee simple which descends to *A.*'s heir; he has not a *contingent interest*, as he is a person in being and ascertained, and the event on which the limitation to him depends is certain; and he has not a *vested estate*, as the whole fee is vested in *A.* or his heirs. He has, therefore, no estate; the limitation being executory, and conferring on him and his heirs a certain fixed right to an estate in possession at a future period. *Butl. Fearne, 1.*

3 *T. R.* 88. 93.

[7 & 8 *Vict.*
c. 76, s. 5.
1 *Ib.* c. 26.]

such person's disposal, or go to his representative on his death.*

* This passage requires some qualification. If freehold property be devised to "*A.* and his heirs; but if he shall die without leaving issue, then to *B.* and his heirs," the words "without *leaving* issue," have been held to mean an indefinite failure of issue, and of consequence to create an estate tail in *A.*, with remainder to *B.* in fee. But the same words as to leaseholds have been construed to mean a failure of issue *living at the death of the legatee*; and, therefore, a bequest of leasehold property held for a long term of years, to "*A.* for ever; but if he shall die without leaving issue, then to *B.*," gives *A.* the entire interest in the term, subject to an executory devise over in favour of *B.*, dependent on the event of *A.*'s dying without issue living at the time of his death. In devises of terms for years or other personal estate, the Courts were much inclined to lay hold of any words in the will, to confine the generality of the expression *dying without issue*, to dying without issue *living* at the time of the legatee's decease. But with respect to freeholds the rule was just the reverse. *Shapland v. Smith*, 1 Bro. Cha. Ca. 75. *Hodgeson v. Bussey*, 2 Atk. 89. *Wilkinson v. South*, 7 T. R. 555. *Britton v. Twining*, 3 Meriv. 183. [*Kinch v. Ward*, 2 Sim. & Stu. 409. *Fearne's C. R.* 471, *et seq.* See 2 *Roper's Leg.* 445, ed. 1828. But now in all wills made on or after the 1st *January*, 1838, by the statute 1 *Vict. c.* 26, the rule above-mentioned, as applied to bequests of leasehold and other personal estate, is made the rule of construction in regard to devises of real estate. The words of the 29th section are as follow, 'that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of

Fearne, E. D.
418.

As a general rule an executory devise cannot be barred or destroyed by any act *of the person taking the preceding fee*.*

issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate, by a preceding gift to such issue.'

The student will observe, that the rules of construction prescribed by the act, ss. 28, 29, make a very material alteration in the quantity and value, not only of the estate of the first devisee, but also in that of the person entitled under the executory devise over: thus, if the devise were to *A.* generally, or to *A.* and his heirs, and if he dies without issue to *B.*, or to *B.* and his heirs, under the old rule of construction, *A.* took an estate tail, and with it, the power of acquiring the absolute ownership by barring *B.*'s remainder, whether for life or in fee: but now by the sect. 28, the devise to *A.* without words of limitation carries the fee: and by sect. 29, above cited, the devise over gives a fee to *B.* to take effect in the event of *A.* dying without leaving issue, living at his death, an executory devise, which is indefeasible by *A.*]

* If the preceding fee be an estate tail, the tenant in tail may destroy the executory devise and all remainders over. *Pig. Rec.* 130, 134, *Cov. Rec.* 176. The consequence is, that an executory devise limited to take effect on an indefinite failure of issue under the preceding estate tail is not too remote, [for it is limited to take effect within the compass of

But *the person entitled to the executory estate* may bar his own claim by *release to the first taker in possession* or [he may by the 7 & 8 Vict. c. 76, s. 5, convey it to a stranger; previously to that statute he might have,] *assigned it in equity for a valuable consideration*; and as to lands in *Ireland*, he might have conveyed it at law, as if it were vested in possession. He may also devise it.

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547.

4 & 5 W. 4.
c. 92, s. 22.
Supra, p. 193.

So if *the person entitled to the executory estate came in as a vouchee on a common recovery or levied a fine*, [previously to the statutes 3 & 4 W. 4, c. 74, and 4 & 5 Ib. c. 92,] he was barred by estoppel.*

the estate tail, or *eo instanti* that it determines; and at any time before the happening of the event, on which the executory devise is to take effect, it is barrable by a deed of disposition under the 3 & 4 W. 4, c. 74, and 4 & 5 Ib. c. 92, as it was previously to those acts barrable by recovery; but where an executory devise, limited after a general failure of issue, is collateral to and independent of any previous estate tail, the executory devise over would be void. *Lanesborough v. Fox, Ca. tem. Talb.* 262, 4 *Cru. Dig.* 349, ed. 4, [unless under the 1 & 2 Vict. c. 26, a similar devise might be construed to be limited on a failure of issue living at the decease of the person, the failure of whose issue is contemplated.]

* On a devise to “*A.* and his heirs, and if he die without issue in the lifetime of *C.*, then to *C.* and his heirs,” if *A.* entered and suffered a common recovery without vouching *C.*, the executory devise to *C.* was not barred by the recovery. *Cro. Jac.* 592. It will be observed, that this is an executory devise expectant on an estate in fee, and could not, therefore, be barred by the recovery of *A.* alone, as it might have been, if the limitation to *A.* had been to his issue, instead of to his

Fearne, E. D.
419, 423.

CHAP. XV.

OF A CONDITIONAL LIMITATION.

Fearne, C. R.
9. 414. *Sand.*
Uses, 182, &c.

A REMAINDER is to *commence* when *the particular estate* is, from its very nature, to *determine*; it is, as it were, a continuance of the *same estate*; it is a *part of the same whole*. A *conditional limitation* is not a continuance of the *estate first limited*, but is entirely a *different and separate estate*. It is *not* to commence on the *determination of the first*, but *the first is to determine when the latter commences*. It is the *commencement of the latter* which rescinds and destroys the former; and not the *ceasing of the former* which gives existence to the last. The particular estate and remainders are, in fact, as the very terms imply, *but one and the same estate*. The estate first [limited], and the conditional limitations, are *separate and distinct estates*.*

* Between a condition and a conditional limitation there is this difference: a condition respects the destruction and determination of an estate; a conditional limitation relates to the commencement of a new one. A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger. Breach of a con-

If *an estate tail* be first limited, and a con- See *Coup.* 379.
Driver v.
Edgar.

dition gives a *right*—the happening of the event whereon the conditional limitation depends gives an *estate*: some act must be done by the grantor or his heir to reduce the estate into possession on breach of a condition, he must enter or claim: it is the effect of a conditional limitation to destroy the prior estate, and create a new one, without any act to be done by the successor. The property of a condition is to determine the whole estate, and we have seen, *ante*, pp. 186, 187, that a remainder cannot, in consequence, be limited to commence on an event, which is marked out by a condition, to defeat the preceding estate. This, however, being a strict rule of law, is confined to limitations taking effect by the common law. In the construction of conveyances to uses and wills, a distinction is allowed between words which operate by strict condition, and those which do in fact but limit or circumscribe the boundary of the estate, though they sound conditionally. Thus, words, which in conveyances at common law would be held to create strict conditions, have, in conveyances to uses, been construed to confer *estates*, which are appropriately called conditional limitations, [and in wills, one class of executory devises]. If a conveyance be made to *A.* and the heirs of her body, provided she marries with the consent of certain trustees, but in case she marries without such consent, or dies without issue, then to *B.* in fee; *B.*'s remainder would, under this conveyance, at common law be void. If such a limitation were contained in a conveyance to uses, or in a will, the estate of *B.*, though bad as a remainder, would yet be good as a conditional limitation, or an executory devise, to effectuate the obvious intention. *Fry's case*, 1 *Vent.* 199. *Gulliver v. Ashby*, 4 *Burr.* 1930. But though these peculiar gifts may be termed conditional limitations, they are, in fact, nothing more than executory devises in a will, and shifting, springing, or contingent uses in a deed. The con-

ditional limitation be made upon that estate,* [a deed of disposition in conformity with the provisions of the 3 & 4 *W.* 4, *c.* 74, and 4 & 5 *Ib.* *c.* 92,] by the tenant in tail, before the event or condition happen on which the limitation is to arise, will bar the estate depending on that event or condition; [the same result was obtained by a common recovery suffered by the tenant in tail previously to the above statutes.]

Supra, p. 213. As to the barring, [transferring, and devising] such conditional limitation, the law seems to be the same as with respect to an executory fee by devise.

ditional limitation is the common quality of all; the devise and the use are merely indicative of the conveyance. An executory devise is a conditional limitation by *will*,—a shifting use is the same by *deed*,—the latter more perfectly, because a preceding estate is usually created with it, and the time previous to the happening of a conditional limitation should, and usually is, filled up with a limitation, which the subsequent conditional gift cuts short,—if there be no preceding estate the future isolated gift assumes the character of an executory devise or [a future or springing] use,—if there be a preceding estate, then the subsequent interest is in strictness a conditional limitation. This distinction, however, is not always attended to in practice.

* For an instance of which, see the case mentioned in the last note.

CHAP. XVI.

OF A REVERSION.

WHEN a person has an interest in lands, and grants a *portion of that interest*, or, in other terms, a *less estate than he has in himself*, the possession of those lands shall, on the determination of the granted interest or estate, *return or revert to the grantor*.

2 Bl. Comm.
175. Co. Litt.
22, b. Plowd.
151. Throck-
morton v
Tracy.

It must here be remarked, that it is said the *possession* of the lands shall return to the grantor on the determination of the grant, for a *present interest* remains even during the existence of the grant in the person making it; and this interest is what is called *his reversion*, or, more properly, *his right of reverter*.*

* A reversion is something more than a bare right; it is an actual estate in the land, bearing the fruits of seignory. When a conveyance is made to two persons for life, with remainder in fee to the *survivor*, this is a contingent remainder, and the particular estate may be determined before the contingency happens; in which case, the fee would remain in the settlor.

This right of reverter can only arise by the *act of law* ; it cannot be created by the act of the party, though it is a consequence of his previous act. If a person [by any assurance executed before or upon the 31st day of *December*, 1833,] limited particular estates to strangers with the ultimate limitation to himself in fee, or to his own right heirs, the latter limitation would not take effect *as a remainder*, or by reason of the *express limitation* of the grantor ; but, as the law would have given to him or his heirs, as a consequence of the preceding limitation, the same interest or estate as the express words would have conveyed, those words were deemed wholly nugatory, and the grantor or his heirs was in *in reversion*, or of *the old estate*. [But by any assurance executed after the above-mentioned day, such a limitation confers upon the settlor a *new estate*, and he is not in, of his old estate ; the statute 3 & 4 *W.* 4, c. 106, s. 3, having altered the law in this respect.]

Watk. on Desc.
168.

A reversion being *an immediate interest*, may be conveyed to another person, though to an utter stranger. The conveyance of it need not be confined, like the conveyance of a right, to the actual tenant of the freehold. The proper mode of conveying a reversion is by *grant* ;*

Watk. on Desc.
110, 111.

* *Mr. Fearne* is represented as having been of opinion (*Posthum. Works*, 28,) that the *grant* of a reversion, in consideration of money, would require inrolment under the statute

though it may also be passed by a *lease and release*,* or *bargain and sale*, such bargain and sale

See n. (1) to
Co. Litt. 270, a.
and n. (1) to
271, b. s. iii.
Sand. Uses,
450—455. 469.
2 *Co.* 15. *Wise-*
man's case.
Watk. on Desc.
111, n. (t),
139, N. a.
2d ed.

of *H. 8.* But he was evidently mistaken if he entertained such opinion, as the statute of 27 *H. 8.* c. 16, is expressly confined to conveyances by bargain and sale *only*, and does not embrace grants, which have nothing to do with a bargain and sale. Besides, that statute has an immediate and manifest relation to the *Statute of Uses*; and was ordained in order to prevent *secret transfers*, which might have been effected by a bargain and sale, as the bargainor would stand seised to an use, and that use would have been immediately executed by the statute, as, at this time, is the case of a bargain and sale of a chattel interest, or lease for a year. The *bargain and sale* was, therefore, ordered to be inrolled; but a *grant* of a reversion was *not*, at the time of that statute, a *secret conveyance*, as it was not good without *attornment*, which was a matter of publicity, and answered the same purposes as livery did on a feoffment.

Of *attornment*,
see *Gilb. Ten.*
81, *et post*, b. 2,
c. 2.

And the only case which *Mr. Fearne* has referred to is that of *Lude v. Baker*, which cannot apply to the subject at this day, since the statute of *Anne* has rendered attornment unnecessary.

2 *Vent.* 149,
&c.

In the case of *Lude v. Baker*, the conveyance then in question was declared to be *not* good *as a bargain and sale*, for want of inrolment;—that it could not be taken as a *covenant to stand seised*, because it was not pleaded as such, but as a grant; and that it was not good *as a grant*, because it was pleaded *without attornment*. The case of *Lude v. Baker*, therefore, seems to negative the doctrine of *Mr. Fearne*, as it implies that the conveyance spoken of would have been good WITHOUT INROLMENT, *if attornment had been pleaded and proved*; and, as attornment is now become unnecessary, it seems to follow, that *such a grant* would now be good.—
Note by MR. WATKINS.

* Which is now the usual mode of passing the reversion,

[7 & 8 Vict.
c. 76, s. 2, *vide*
infra, ch. Uses
& Trusts.
Barg. & Sale.]

being regularly inrolled; or the reversioner may *covenant to stand seised*: but a reversion cannot be granted to commence *in futuro*.*

But, even before the Statute of Frauds (29 Car. 2,) a reversion could not be conveyed *by parol*; it must have been *by deed*, as it lay not in livery. For where *the possession did not pass*, the law required *a deed*, or a solemn instrument under seal, when there was no matter of record, as the evidence of the transfer.

A reversion may also be *charged* by the person entitled to it.†

Vide ante, c. 8,
et post, b. 2,
c. 16. See as to
the operation
of a fine, *ante*,
c. 8, *et post*,
c. 15. Of Fines.

If an estate tail were created, the reversion, unless it were in the Crown, [might previously to the statutes 3 & 4 W. 4, c. 74, and 4 & 5 Ib. c. 92,] be barred or destroyed by the tenant in

as it saves the expense, in future investigations of the title, of proving the existence of a particular estate at the time the reversion was conveyed as such.

* Attornment was formerly necessary to perfect the transfer of a reversion; and attornment was originally *coram paribus*, and equivalent to livery of seisin. It followed, that a reversion could not be granted *in futuro*, a rule which still governs the transfer of reversions; [*i. e.* for an estate of freehold to commence *in futuro*, when the grant operates at common law, and not by the Statute of Uses. A grant to *I. S.* and his heirs, to the use of *B.* and his heirs, from and after next *Michaelmas*, is good as a springing use.]

† And as it is assignable, so it is devisable. 3 T. R. 93.

tail suffering a *recovery* of the premises, [and now, the same result may be effected, by a deed of disposition in conformity with the above acts.]

[But a recovery by a woman tenant in tail of the gift of her husband is void unless with the consent of the person next entitled to the inheritance by the 11 *Hen.* 7, c. 20 : and by stat. 34 & 35 *Hen.* 8, c. 20,* a reversion in the Crown of lands granted to the subject for services, cannot be barred.]

* If the reversion be in the Crown by its own reservation, there can be no doubt of the imbecility of the recovery ; but if the reversion descend or become forfeited to the Crown, there is said to be a doubt whether it is then protected by the statute of *H.* 8. The act recites, that divers of the King's most noble progenitors, and especially *King Hen.* 8, most liberally above all other had given and granted, or otherwise provided, to his and their loving and good servants and subjects, lands, tenements, rents, services, and hereditaments, to the intent to recompence them for services performed. It is therefore enacted, that no recovery by a tenant in tail of any lands, tenements, or hereditaments, "whereof the reversion or remainder at the time of such recovery shall be in the King, shall bind or conclude the heirs in tail;" but that after the death of any such tenant in tail, against whom any such recovery shall be had, the heirs in tail may enter, have, and enjoy the said lands and tenements, the said recovery to the contrary notwithstanding. 34 & 35 *H.* 8, c. 20. In a late case, a settlement was made to the use of the first and other sons of *A. B.*, severally and successively, in tail male, with divers remainders over, with ultimate remainder to the right heirs of the settlor. The settlor was afterwards attainted of treason, whereby his reversion in fee became forfeited to the Crown. A tenant in tail male under this settlement, when in possession, suffered

See also 3 & 4
W. 4, c. 74,
s. 18.

The reversioner continues tenant to the lord during the existence of the particular estate; and the particular grantee shall hold of the reversioner; and, as a necessary consequence or incident, the rent, fealty, &c., shall always follow the reversion.*

a recovery, and sold the premises to *Lord Clanmorris*, who now objected to the title, on the ground of the doubt said to be afforded by the books as to the operation of the recovery in barring the reversion forfeited to the Crown. In the House of Lords the existence of the doubt was recognised; but their Lordships made no attempt to settle the question. General opinion, said *Lord Redesdale*, was certainly against the title; but it was not necessary to come to any decision on the point. It was sufficient, on the question before the House, if the law was doubtful. A purchaser had a right to require a marketable title, and this title rested on a point of law which was at least doubtful. The Lord Chancellor also thought that the doctrine on this point could not be stated so clearly against the Crown, that a purchaser ought to be compelled to take a title depending on it; and that, as the purchaser had been brought into Court upon a doubtful title, he ought to be discharged from his purchase, with costs; which was accordingly done. *Bloss v. Clanmorris*, 3 *Bligh*, 62; and see further on this subject, *infra*, ch. *Fines and Recoveries*, and *Cov. Rec.* 222.

[Where the grant was originally by the Crown for natural affection, the reversion might be barred, as was decided in the *Duke of Grafton v. Lond. and Birm. Rail. Co.*, 5 *Bing. N. C.* 27, the grant was by King *Charles 2*, for natural love and affection to one of his illegitimate sons *Henry Fitzroy*, Earl of Euston (afterwards created Duke of *Grafton*,) in tail male. In 1835, the present Duke, as heir in tail male, executed a disentailing deed under the 3 & 4 *W.* 4, c. 74, the Court of *Exchequer* held the reversion barred.]

* Consequently, if a *remainderman* grants an estate com-

As the creation of a particular estate is of absolute necessity to give existence to a reversion, so the continuance of the reversion depends upon the continuance of the particular estate; for if, by any means, as by forfeiture, surrender, or regular expiration, such particular estate determine, the interest of the grantor must cease, of necessity, to be an estate *in reversion*, and will become an estate *in possession*, into which he may immediately enter.

Plowd. 153.
155.

mensurate with the prior interest in the land, nothing passes; but if a *reversioner* makes such a grant, the fruits of seignory will pass, and the conveyance will be good. Thus, if *A.* grant to *B.* for life with *remainder* after the death of *B.* to *C.* in fee, and *C.* grant to *D.* for the life of *B.*, this grant is nugatory: but if a tenant in fee grants to *A.* for life, and afterwards grants to *B.* for the life of *A.*, this latter grant will be valid, and confer on *B.* a remainder, which will fall into possession on the forfeiture or merger of the prior estate in *A.* *Co. Litt.* 49. *Salk.* 232. *Lord Raym.* 523.

CHAP. XVII.

OF A RIGHT.

Gilb. Ten. 21,
&c. 37, *&c.*
2 Bl. Com. 195.

ONE person may have *the actual possession* of certain lands, and another the *right of possession*, or the *right of propriety*; as, if a person enter wrongfully into my lands, he will have the *actual possession*; but I may enter and oust him if I please, as *the right of possession* is in me.* If,

* This power of actual entry is now very much curtailed. It was formerly allowed even to actual ouster; but at the present day appeals to force are much discouraged. A right of entry, according to modern notions, may be defined to be, a right to bring an action of ejectment. When real actions fell into disuse, the phrase, "right of entry," became inapplicable to the remedies retained. It is only as opposed to a right to sue in *a real action* that it can be properly understood. [Real actions are now abolished by the stat. 3 & 4 W. 4, c. 27, s. 36; previously to their abolition however they had grown obsolete.] There was a certain length of time, during which the right might be pursued without resorting to the formidable process of a real action; during that time the party might have made an actual entry: but such entries obviously tended to and frequently produced breaches of the peace. To prevent this, a new species of action, called an ejectment, was introduced, by means of which all claims of title to *enter* were tried and adjusted; and to facilitate the use of this action,

however, I do not exert that right and enter within a limited time, my power of entering is taken away, and I am driven *to my action*, to recover the possession; and if I do not avail myself of my possessory action, I shall have only *a right of propriety, or mere right*, left.

A right is now grantable over, and it can of course be extinguished. It could not be even surrendered; it would not pass to a stranger by fine,

10 Co. 46, b.
Lampet's case,
n. (1) to Co.
Litt. 265, a.
Co. Litt. 338, a.
Touchst. 14.
2 Co. 55, 56.
Buckler's case.

the law on forcible entries, as laid down in *Co. Litt.* 257, b., was more strictly administered. By that law it appears, that a peaceable entry by the rightful owner will subject him to the penalties of a forcible entry, if he *detains* possession after it has been demanded by the person ousted; a peaceable entry, therefore, cannot avail much. But though the phrase "right of entry," is thus inaptly retained, its use is to ascertain the right to bring an action of ejectment, which cannot be maintained by a person who has not a right of entry. See 2 *Wood. Lect.* 170. In the case of vacant and open possession, the peaceable entry of the rightful owner is perhaps an exception to the above remarks, 8 *East*, 356; but the appearance of the late tenant, and a demand of possession by him, would without doubt be sufficient to constitute a forcible *detainer*, if the possession were not immediately restored to him. See also, on this subject, the late case of *Milner v. M'Lean*, 2 *Car. & Payne*, 17. As to descents which toll the entry [now abolished, by statute 3 & 4 *W.* 4, c. 27, s. 39], objections on that head were overcome by laying the demise in the lifetime of the ancestor, which by the common consent rule, the defendant was obliged to admit before he was permitted to defend the action; and if he did not defend, judgment was given against him by default. *Adam. Eject.* 41.

Plowd. 485.

though by such fine the right would be *barred*, as the cognizor could not claim a right against his own fine, which is a matter of record, and, by consequence, an estoppel; as by that fine he *had acknowledged the right to be in another*: [but by the statute 4 & 5 W. 4, c. 92, which abolished fines and recoveries in *Ireland*, a contingent estate, right, or interest in lands there, might have been conveyed in the same manner as if it were vested in possession, s. 22. [And now by the 5th section of the 7 & 8 Vict. c. 76, which extends to all parts of the United Kingdom except *Scotland*, any contingent or executory interest, right of entry for condition broken, or other future estate or interest may be conveyed to a stranger, but not so as to assign any *chose in action* at law, nor to dispose of the expectancy of an heir or next of kin of a living person.] The proper mode of extinguishment is that of a *release*, to the person in actual possession of the land.* [Before the abolition of fines, a fine *sur cognizance de droit tantum* had the same effect. Before the recent statute 1 Vict. c. 26, a right, though descendible, was not devisable; but now by that act all property to which the testator is entitled at law or in equity, in possession, reversion, or in contingency, may be disposed of by a will in writing, signed at the foot or end by the testator, or by some other person in his pre-

¹ *Stra.* 132.

² *Ath.* 420.

* [A release of right to the remainderman will enure to the benefit of the particular tenant. *Co. Litt.* 353.]

sence and by his direction ; such signing to be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, who shall attest and subscribe the will in the presence of the testator. The power of testamentary disposition is, by the concluding branches of the third section, extended to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons, in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will ; and also to all rights of entry for conditions broken, and other rights of entry ; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.] *Sec. 9.*

CHAP. XVIII.

OF A POSSIBILITY.*

10 Co. 50, b.
 1 *Strange*, 132.
 2 *Atk.* 420.
 1 *H. Blackst.*
 30. 3 *Durnf.*
 & *East*, 88.
 2 *P. Wms.* 132.
 2 *Atk.* 420.

A POSSIBILITY cannot be on a possibility. A possibility may be *released*; is *devisable* [as well by a will made previously to the 1st day of

* Possibilities are generally arranged into two classes: the one consisting of possibilities which are coupled with an interest, such as contingent remainders, executory devises, springing or shifting uses, [depending upon a contingency;] the other bare or naked possibilities, such as the hope of inheritance entertained by the heir on the courtesy of his ancestor, or the chance of succession of an individual where the gift is to several with remainder to the survivor. The former class may, perhaps, with more propriety be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility, it is a present interest, and may, [as noticed in the text, be transferred and] devised; see *Perry v. Phelps*, 17 *Ves.* 173, 182. On the other hand, the expectancy of an heir-apparent, during the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation, [and this is expressly excluded by the late statutes [mentioned in the text; and by the 1 *Vict. c.* 26] from the testamentary power of disposition thereby conferred. See also 3 *Mer.* 667.] All contingent interests are executory, and while they remained so, the owners [could not

January, 1838, as by one made upon or since that day, according to the statute 1 Vict. c. 26, s. 3]; and is assignable by commissioners of bankrupt. It [might have been barred before the statutes 3 & 4 W. 4, c. 74, as to lands in England and Wales, and 4 & 5 Ib. c. 92, as to lands in Ireland,] by fine, by way of estoppel; but, it should seem, not otherwise. So [previously to the 7 & 8 Vict. c. 76, as to lands in England] it was assignable in equity, at least if accompanied with an interest; so an

10 Co. 50, a.
See 1 Ves. 390.
Fearne, 547,
548. 2 Black.
Com. 290.
1 Ch. Rep. 158.

before the recent statute mentioned in the text, if relating to lands in *England*] assign them at law. 10 Co. 50, a. 4 Co. 66, b. 1 *Inst.* 264, b, 265, a, b, n. 212. 1 *Ves.* 390, 411. 3 *Ves.* 391. 3 *T. R.* 88, [although they were assignable in equity, 1 *Ves.* 409. 2 *P. Wms.* 191. 2 *Atk.* 420. But if they related to lands in *Ireland*, they might have been conveyed or assigned at law as noticed in the text]. Contingent interests, and even mere expectancies [might, as before observed, be bound by fine by estoppel]. Thus, where a husband and wife granted to trustees an estate, of which the wife's father was seised in fee simple, and afterwards in the lifetime of the father they levied a fine of the lands to the uses of the settlement, and the father died, leaving the wife one of his coheiresses at law: on a question concerning the effect of these assurances, it was held, by the Court of King's Bench, that the moiety of the wife became subject to the uses of the settlement, by reason of the fine, which operated as an estoppel against the husband and wife, and all persons claiming title under them. *Helps v. Hereford*, 2 *Barn. & Ald.* 242. See more on Possibilities and Estoppel, 1 *Fonbl. Tr. Eq.* ch. 4, s. 2. 1 *Madd. Ch.* 549, 2d edit. *Hooper v. Rossiter*, 1 *McClel.* 527.

agreement to settle lands in possibility should be decreed, if they afterwards descended: [and as to lands in *Ireland* it might by the above statute 4 & 5 W. 4, c. 92, s. 22, have been conveyed in the same manner as if it were vested in possession: [and now by the 7 & 8 Vict. c. 76, s. 5, which extends to all parts of the United Kingdom, except *Scotland*, a possibility (not being the mere expectancy of one, as heir or next of kin,) of a person living, may be transferred.

A Court of equity will not enforce a voluntary assignment of a possibility.*]

* *Meek v. Kettlewell*, 1 *Hare*, 464, aff. 1 *Phillips*, 342.

CHAP. XIX.

OF AN EQUITY OF REDEMPTION.

IF a person convey lands to another on condition, as a security for money, and the condition be broken, he may, under certain circumstances, *redeem* the premises; and this privilege is denominated his *equity of redemption*.*

2 *Bl. Com.* 158.
Powell on
Mort. passim.
Butt. n. (1) to
Co. Litt. 205, a.
 & (1) to 208, a.

* The equity of redemption continues open for twenty years after the last acknowledgment of it: beyond that time the mortgagor is for ever barred of relief in equity. At law he has lost the estate by non-performance of the condition; and he loses it in equity by allowing the mortgagee to remain in possession for twenty years without demanding an account or obtaining from him some acknowledgment of the existence of the mortgage. At law, [before the operation of the recent Statute of Limitations 3 & 4 *W. 4, c. 27*] sixty years were allowed for the prosecution of particular claims to real estate. In equity, the remedy is for ever lost by twenty years' acquiescence in the adverse enjoyment of another person. "The lapse of twenty years," observes that eloquent Judge, Sir Thomas Plumer, "affords a substantive insuperable plea in bar: it is the fixed limit to the remedy—the *tempus constitutum*: one day beyond is as much too late as one hundred years. This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud: no plea of *poverty*, *ignorance*, or *mistake*, can be of any avail: however clear and indisputable

Such equity of redemption may be *released* to the mortgagee. Sometimes, indeed, the conveyance called *a lease and release* is adopted for the

the title, if the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title: the door of justice is closed: the claimant cannot be heard to shew his title: it is a decisive answer to him, that he comes too late: that alone is the bar: his title remains, but he has lost his remedy." *Cholmondely v. Clinton*, 2 Jac. & Walk. 139. *Raffety v. King*, 1 Keen, 601.

[From the case of *Baldwin v. Peach*, 1 Yo. & Col. 453, the following principle may be deduced, that Courts of equity will presume a release within the same limits of time within which juries will be directed to presume it, whether any statute of limitations is applicable or not.

The 28th section of the statute 3 & 4 W. 4, c. 27, enacts that the mortgagor shall be barred of his equity of redemption after twenty years from the time the mortgagee took possession, or from the last written acknowledgment. Upon the subject of acknowledgments of the mortgagor's title by the mortgagee, it had been decided, previously to the above statute, that the following references to the mortgage were sufficient to keep alive the equity of redemption for the period of twenty years from the time they were made. Thus, where] the mortgagee has alluded to the mortgage as a redeemable interest in a letter to a friend (*Fenwick v. Reed*, 6 Madd. 8,) (such letter proving itself, *ib.*)—in a settlement between third parties (2 Cox's Ch. Ca. 294,)—in a surrender, to which neither the mortgagor nor his heirs are parties (*Hansard v. Hardy*, 18 Ves. 455,)—in an assignment wherein the estate is treated as subject to redemption (*Smart v. Hunt*, 4 Ves. 478, n. a.)—in an answer in Chancery (*Proctor v. Oates*, 2 Atk. 140,)—by a recital in a deed (*Carew v. Johnston*, 2 Sch.

transfer of such interest; but then the latter species of conveyance does not operate as a lease and release with respect to the equity, as a person *cannot be seised of an equity to an use*; and, consequently, as no use arises by the bargain and sale, the release can only operate, with respect to the equity, as a mere or proper release; just as it would have done *without* such a bargain and sale, or lease for a year.

& *Lef.* 295,)—in a devise, such as “all my mortgaged estate,” or in words of like import (*Anon.* 3 *Atk.* 314,)—by a demand of the principal money, or a *receipt* of interest (*Trash v. White*, 3 *Bro. C. C.* 289,) by an *account* kept (*Vernon v. Bethell*, 2 *Eden. Rep.* 114,)—stated (1 *Pow. Mortg.* 370)—settled (*Gould v. Tancred*, 2 *Atk.* 533,)—or promised (1 *Pow. Mortg.* 370, n. (B.)). The *mere demand*, however, of an account on the part of the mortgagor, without process or acknowledgment (*Hodle v. Healy*, 1 *Ves. & Bea.* 540,)—or an account stated without the authority of the mortgagee (*Baron v. Martin*, *Coop. Rep.* 192,)—or a devise in the words above-mentioned after a foreclosure or a conveyance of the equity of redemption (*Silberschildt v. Schiott*, 3 *Ves. & Bea.* 45,)—would not, even before the late statute, take the case out of the rule. Some of the books seem to have suggested that a *continued acquiescence* by the mortgagee in the mortgagor's right to redeem, was requisite to keep alive the equity. But it is observable, that any one of the acknowledgments just mentioned would singly confer a right of redemption on the mortgagor and his heirs, for a period of twenty years from the time such acknowledgment was made, and for a further period of ten years beyond that time, if the mortgagor or his heirs were infant, lunatic, under duress, beyond sea (not having absconded, *Jenner v. Tracey*, 3 *P. Wms.* 287, n. (B.)) or under any other legal disability. 1 *Pow. Mortg.* 389. [See also 3 & 4 *W.* 4, c. 27, s. 16.]

The conveyance by lease and release has, therefore, been adopted for caution only; as, *in case there were an equity* only in the person intending to convey, such release would operate *as a common* release, and so pass it to the mortgagee, notwithstanding the bargain and sale; and *in case there were any legal freehold, interest, or estate, left in the mortgagor*, by reason of any defect in the mortgage deeds, *then* the bargain and sale would operate on such legal interest or estate, and, with the release, pass that also, [but now by the 7 & 8 Vict. c. 76, s. 2, the lease for a year is dispensed with.]

See 3 Bro. Ch.
Ca. 289.

Trash v. White.

In like manner, as a Court of equity considers a mortgage, though in fee, merely *as a security for money* till the time of redemption be past, the mortgagor frequently disposed of his own equity, or right of redemption, to a stranger. This could properly be only by way of *assignment, grant, or devise*; for he *could not* pass it by *feoffment, bargain and sale*, nor, consequently, by *lease and release*, as the seisin, or legal estate, *was in the mortgagee*; though the lease and release were often adopted for the reason before noticed with respect to the conveyance of such an equity to the mortgagee in possession.*

* If a mortgage in fee be made *before* marriage, the wife [if married on or before the 1st January, 1834], will not be entitled to dower of the equity of redemption: [for dower previously to the statute 3 & 4 W. 4, c. 105, was a mere

[An equity of redemption is liable to escheat for want of heirs of the mortgagor.] *Lord Downe v. Morris,* 8 *Jurist*, 486.

legal right; and, by a strange anomaly, not allowed in equity, [but now by that statute women married after the above day are dowable out of equitable estates]. So, if a mortgage for a term were made *before* marriage, the mortgagor's wife would not be entitled to dower as against the mortgagee. If the mortgage were made *after* marriage, she would of course take precedence of the mortgage, whether it were in fee or for years, unless she concurred in the mortgage by fine or recovery; and then she would be deprived of her dower to the extent only of the mortgage, [if no further purpose was declared], a fine or recovery on the occasion of a mortgage being a partial, not an absolute, bar of dower. [But if the deed indicates a purpose, beyond that, of creating a charge, and shews an intention that the right of dower was to be wholly relinquished, the wife will be barred. In a mortgage or other deed creating an incumbrance, and in which the wife concurred in declaring the uses of the fine, it has not unfrequently been a doubtful question, what expressions would be considered sufficiently indicative of an ulterior purpose beyond that of making the security. *Roper's Husb. and Wife*, ed. 1826, 1 Vol. 520, 537. 2 *Powell's Mortg. by Coventry*, p. 679, n

The 21st sect. of the statute 3 & 4 *W. 4, c. 74*, seems intended to obviate similar questions arising on a mortgage by a tenant in tail. It enacts that any disposition under the act by way of mortgage, or for any other limited purpose shall, to the extent of the estate thereby created, be an absolute bar, in equity as well as at law, to all persons, as against whom, the disposition is authorized by the act, notwithstanding any intention to the contrary expressed or implied in the deed. It is presumed that it was not the intention of the act to prevent a re-settlement of the equity of redemption by the mortgage deed; although that might be considered within the

[Sometimes a mortgagor mortgages his equity of redemption to a second or third mortgagee,

letter of the words "intention expressed." The latter branch of the clause provides, that if the estate created be *pour autre vie* for years absolute or determinable, or if an interest, charge, lien, or incumbrance shall be created without a term of years or any greater estate for securing the same, the disposition shall in equity be a bar only so far as may be necessary to effectuate the mortgage or other limited purpose, interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary expressed or implied.]

As to a mortgage in fee made before marriage, [a widow married on or before the 1st day of January, 1834,] cannot redeem, having no interest in the equity of redemption; but as to a mortgage by demise made before marriage, she is entitled to be endowed of a third part of the rent, and a third part of the reversion; and that interest will enable her to redeem; which having done, she will stand in the situation of an ordinary tenant for life paying off an incumbrance, and must pay one-third of the interest on the mortgage money, and her proportion of the principal, if the heir sues to redeem the mortgage in her hands in her lifetime. Suppose an estate, yielding 180*l.* a-year, to be mortgaged for a term of years before marriage for 1200*l.* at 5*l.* per cent. (the interest of which will be 60*l.* a-year,) and the husband dies, leaving a widow and son: the widow will be entitled to a third part of the pepper-corn rent reserved on the mortgage term, and to a third part of the reversion of the immediate freehold and inheritance of which her husband died seised in possession. On a writ of dower at law she would obtain a verdict; but it would be with a *cesset executio* during the term. Her remedy at law, therefore, would in the end be fruitless. But having a right to redeem, she may pay off the mortgage money, and take an assignment of the term to herself; and afterwards file a bill against the heir to compel him to redeem or stand

and even more ; and the general rule is that the several mortgagees are entitled to the benefit of

foreclosed. He would of course redeem, if the estate were not overburthened by the mortgage. In a Court of equity he would not be allowed to set up the mortgage term as against the widow, for the estate was burthened by their common ancestor ; and good conscience dictates that they should bear the burthen created by the author of their respective rights in proportionate shares. The widow is entitled to one-third of the estate for her life, and a tenant for life is only bound to keep down the *interest* on prior charges ; if the principal be paid off, he must contribute in proportion to the benefit he derives from a cessation of the annual payments of interest during his life, which is measured by the value of his life, his age, constitution, &c.—a reference being made to a Master in Chancery to ascertain the exact proportion. By redemption, the widow will obtain a third part of the rent *minus* a third part of the interest ; and the yearly account will stand thus :

	Widow.	Heir.		Total.
	$\frac{1}{3}$	$\frac{1}{3}$	$\frac{1}{3}$	
	£	£	£	£
Rent -	60	60	60	180
Interest	20	20	20	60
	—	—	—	—
	40	40	40	120

Hence, by redeeming, the widow will be benefited 40*l.* a-year. If the heir redeem, the widow will be entitled to the whole principal money, deducting the probable gross amount of interest which she would be bound to pay during her life. After redemption, she would of course be entitled to her whole dower. And these observations apply to all cases of mortgages made by the husband, except in the case of a

12 Ves. 130.

2 Bro. C. C.
658. 1 Eq. C.
Ab. 321.
2 Anst. 432.

their securities according to the priority of their dates, the maxim being *qui prior est tempore, potior est jure*. There are, however, exceptions to this rule in cases of fraud, or where the prior mortgagee negligently allows the title deeds to remain in the custody of the mortgagor; in which case if a second mortgagee, without notice of the first, advances money on the mortgaged property, the second mortgagee will be preferred to the first, because by his negligence he has enabled the mortgagor to commit a fraud upon the second mortgagee.

mortgage in fee made *before* a marriage [taking place on or before the 1st day of January, 1834:] *then*, on the principle that there is no dower of a mere trust, she will not be entitled to redeem. But if the mortgage be in fee, and made after such marriage, and in every case of a mortgage for years, whether before or after such marriage, or whether the mortgage be satisfied or not, the widow by a circuitry may become entitled to a beneficial estate in dower. And it is observable, that a dowress, like an heir or devisee, has a right to have the *personal* estate of her husband, as far as it will extend, applied in discharge of mortgages and other debts contracted by the husband, which are charges on the land whereof the wife is dowable. The authorities for this note will be found in 2 *Pow. Mortg.* 681, 690, a, *et seq.* [But now by the statute 3 & 4 *W. 4*, c. 105, a widow married after the above day is dowable out of equitable estates of the husband; so that she would in the case of a mortgage in fee above mentioned be entitled to redeem. For more on the subject of mortgage, see pages 13, 16, 35, *supra*, 158 *infra* in *notis*, p. 258, ch. *Rents*.

Legal mortgages are preferred to equitable: *Amb.* 153.
 but with reference to several equitable mortgages, the same rule, as to priority, prevails as ⁸ *Sim.* 633.
 with legal.

So also in regard to mortgages of chattels real; but there exists an important distinction in reference to securities upon *choses in action*; for notice to the depositories of the fund is essential to the completion of such securities; consequently, mortgages of *choses in action* prevail according to the priority of the notice to the depositories.

The equitable as well as the legal interest in leasehold, is a chattel; and it has been decided that an annuity charged thereon, is also a chattel, and not a *chose in action*.
Wiltshire v. Rabbits, 8 *Jurist*, 769.
¹ *Myl. & K.* 297. ⁹ *Bli. N. S.* 332.
³ *Cl. & Fin.* 457. ³ *Russ.* 1. ⁸ *Sim.* 643.

A second mortgagee, without notice of the first mortgage, by obtaining an assignment of a judgment prior to the first mortgage, will be allowed to unite, or, what is termed *tack*, his mortgage to the judgment; and by that means recover the amount of the judgment debt, in addition to his mortgage money, before the second mortgagee can recover any thing.]
¹ *Vern.* 187.
² *Ib.* 30. 279.
² *Cru. Dig.* 170, &c., ed. 4.

CHAP. XX.

OF USES AND TRUSTS.

2 *Bl. Com.* 327.
Butl. n. (1) to
Co. Litt. 271, b.
 (1) to 290, b.
 384, a and
 add. notes.

It is necessary to the creation of such an use as may be executed by the statute,* that there

* This statute enacts, "That where any person shall be seised of any lands, rent, services, reversions, or other hereditaments, to the use, confidence, or trust of any *other* person or body politic, by any means whatsoever, every such person and body politic, having such use, confidence, or trust, shall henceforth be deemed and adjudged to be in lawful seisin, estate, and possession of and in the same lands, &c., with their appurtenances, to all intents and purposes in the law of and in such like estates as they had in use, trust, or confidence; and that the estate, title, right and possession of the person seised of any lands, &c. to the use, confidence, or trust of any such person, or of any body politic, shall be deemed and adjudged to be in him or them that have such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them." 27 *H. 8, c.* 10, 1536.

Before the passing of this statute, the use was cognizable in a Court of equity only, and was in fact what a trust is now. Thus, under a feoffment to *A.* to the use of *B.*, *B.* had not a legal estate; that is, an estate which he could sue upon, in a Court of law: he had merely a confidence in *A.* to pay over the rents and profits to him *B.*, which if *A.*

be a person to stand seised of certain hereditaments to such an use; that there be a person

Booth's Opin.
at the end of
Touchst. and in
1 *Coll. Jurid.*
241.

Sand. Uses,
passim.

failed to do, *B.*'s remedy was by suit in equity, not by action at law. Hence, *A.*'s estate was called the *legal*, and *B.*'s the *equitable* estate. [The effect of the above statute was, to transfer to *B.* so much of the legal estate of *A.* as was commensurate with the use limited to *B.*]

From the words of this statute it will be perceived, that it relates to *hereditaments*, and not to *chattels*; that it applies only where *one person is seised to the use of another person*, and not where one person is seised to the use of *himself*; and, thirdly, that the *cestui que use* now takes the *legal estate*; [and he takes that estate to the extent of the use limited to him, provided there be a seisin co-extensive with that use.] Therefore, if a conveyance be made to *A.*, his heirs and assigns, to the use of *B.* in tail, *B.* will take an estate tail, and not an estate in fee; the residue of the use in fee, that is, the reversion expectant on the estate tail, will result to the grantor, who will be in of his former estate; so that, if he derived that estate from his mother, it will still continue descendible to his heirs *ex parte maternâ*: but if, by a deed executed after the 31st day of *December*, 1833, the ultimate use were *limited* to the grantor and his heirs, or to the right heirs of the grantor, he will acquire a new estate by purchase, and will not be in of his former estate as he would where the ultimate use undisposed of results to him; statute 3 & 4 *W. 4, c. 106, s. 3.* The seisin must be commensurate with the use. Thus, if a conveyance be made to *A.* generally, which will give him an estate for life only, to the use of *B.* in fee, *B.* will take but an estate for the life of *A.*, for want of a seisin to support any further interest. *Bac. Uses*, 47. *Cro. Car.* 231. 3 *Bulst.* 184. It sometimes occurs in practice that a conveyance is made to *A. B.* and *C. D.*, and the survivor of them, and the heirs of such

Vide infra,
p. 245.

capable of taking that use; and that there be privity of estate and privity of person.

survivor, to uses limiting the estate in strict settlement. In this case, the remainder to the survivor of *A. B.* and *C. D.* is a contingent remainder; and, until the death of one of them, there is no actual vested seisin to serve the uses. This is inconvenient, and should be carefully avoided.

Much doubt was formerly entertained, whether the Statute of Uses could apply to wills, which did not exist in the shape they do now, at the time the Statute of Uses was passed. The mention of wills in the Statute of Uses referred only to the customary wills then in existence, and not to those which were introduced a few years afterwards by the Statute of Wills. *Lord Coke* says, "It is frequent in our books, that an act made of late times shall be taken within the equity of an act made long before." 4 *Rep.* 4 a. b. And in *Broughton v. Langley*, 2 *Lord Raym.* 873. 2 *Salk.* 679, it was admitted that a devise of lands may by express words be limited to the use of some person other than the devisee, and that such devise will be executed by the Statute of Uses; and in *Thompson v. Lawley*, 2 *Bos. & Pull.* 311, the same doctrine was expressly acknowledged. But there is not any necessity for a *seisin* to supply the use in a will; and therefore if the devisee to a use die in the lifetime of the testator, it should seem that the use will not lapse, because it would be as good without that previous seisin as with it; and the Courts will overlook a devise which in event proves to be a mere nullity. 3 *Atk.* 408. 3 *Bro. C. C.* 30. But if there be a devise to one person to the use of another, and the *cestui que use* or beneficial devisee dies in the lifetime of the testator, then it is conceived that the devisee himself will not be entitled to the estate discharged of the use; for the testator has shown a clear intention that the beneficial interest should not rest with him, by directing it over to another person.

1st, There must be a *person* seised ; for a *corporation* cannot stand seised to an use ; and, therefore, if a corporation conveyed, [before the 7 & 8 Vict. c. 76,] it must have been by feoffment, *Sand. 446.* lease (with an actual entry) and release, &c. ; though the Courts would, if possible, support a bargain and sale by a corporation as some other species of conveyance, rather than that it should avoid its own act.* [But now by the above statute the lease for a year is dispensed with].

[See the Chapter on *Corporations*, *infra*.]

2ndly, There must be a person *seised* of *hereditaments* ; for *chattels*, whether real or personal, are not within the statute : though a person may stand seised of the freehold to the use of another for a chattel interest ; as *A. B.*, being seised in fee, may covenant to stand seised to the use of *C. D. for years* ; and such use will be executed by the statute. And this was every day seen by the lease, or more properly by the bargain and sale, upon which a release was grounded. But chattel interests may be conveyed subject to certain *trusts*, as commonly practised.†

* If an alien be enfeoffed to uses, the statute executes the uses [limited on his seisin] until office found ; but upon inquisition the uses are destroyed by relation, and the king holds absolutely. *Bac. 59. King v. Boys, 3 Dyer, 283, b. pl. 31.* So if a person, having committed treason, be made grantee to uses, the use will fail for the benefit of the crown, if the grantee be afterwards attainted. *Throgmorton's case, Moor, 390, 391 ;* [but see stat. 4 & 5 W. 4, c. 23, s. 3.]

† It is generally understood that copyhold lands are not

within the Statute of Uses, and consequently that a power to revoke uses once vested cannot be reserved in a surrender of that species of property as it can in a conveyance to uses of freehold. 1 *Watk. Cop.* [193.] 265. A late case, however, has deranged this generally acknowledged doctrine. By marriage settlement freehold lands were conveyed to the use of the husband for life, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders : with remainder to the children of the marriage, with remainders over. Then followed a provision, that it should be lawful for the trustees, with the consent of the intended husband and wife, to dispose of and convey, either by sale or exchange, the freehold property in question ; and that, for the purpose of effecting such sale or exchange, they, with the consent of the husband and wife, should be at liberty to revoke the before-mentioned uses, and to appoint others in favour of the person with whom the sale or exchange might be effected. The deed then contained a covenant to surrender copyhold premises, the subject in question, to the trustees of the settlement and their heirs, to hold to the same uses and subject to the same powers as were before declared concerning the freehold property. The marriage took effect, and the copyhold premises were surrendered to the uses and subject to the provisions in the indenture of settlement mentioned, and the husband, pursuant thereto, was admitted to the copyhold premises as tenant for life. In 1805, the trustees contracted to sell these freehold and copyhold estates to *Boddington* in fee, and for that purpose they, with the consent of the husband and wife, revoked all the uses declared by the said marriage settlement, and limited a fresh and substituted use to *Boddington* in fee, and the husband surrendered the premises to the trustees, who were admitted, and they afterwards at the same Court surrendered to the use of *Boddington*, his heirs and assigns ; and *Boddington* was thereupon admitted as tenant in fee according to the custom of the manor. *Boddington* now sold to *Abernethy*, who objected to the title. On a bill for specific performance, a case was directed for the

3rdly, There must be a person *capable of receiving the use* ;* and, therefore, a limitation

opinion of the Judges of the King's Bench, on the question, Whether *Boddington* was seised of the copyhold premises in fee? The Court of King's Bench took time to consider, and afterwards sent the following certificate :—" This case has been argued before us by counsel ; we have considered it, and are of opinion that the plaintiff (*Boddington*) has an estate in fee simple at the will of the lord, according to the custom of the manor, in the said copyhold messuages and hereditaments with the appurtenances." *Boddington v. Abernethy*, 5 Barn. & Cress. 776, S. C. 8 Dow. & Ryl. 626. [See also *Rex v. Lord of the Manor of Oundle*, 1 Ad. & Ell. 283.]

* It is not essential that such person be *in esse*, but there must be a probability, or at least a possibility, of his coming into being within the time prescribed by the rule against perpetuities. Hence contingent uses are within the statute, and give legal interests of like quality to the use. 1 *Sug. Pow.* 17, 26, ed. 6. *Bac. Uses*, 51, 92. *Rowe's ed.* 131.

[The student may be here reminded, that the person capable of receiving the *use* under the statute must be some *other* person than the feoffee, releasee, grantee, &c. to whom the *seisin* is transferred : thus, a feoffment, release, or grant to *A.* and his heirs, to the use of *A.* and his heirs, does not give to *A.* the *use* or legal estate under the *statute*, but he takes it by *common law* ; the statute not being brought into operation, because *one* person is not seised to the use of *another* ; but if the feoffment, &c. were to *A.* and his heirs, to the use of *B.* and his heirs, *B.* takes a use under the statute : so, if *A.* bargain and sell, or covenant to stand seised to the use of *B.* and his heirs *B.* takes a use under the statute ; in the two latter instances, the *seisin* is not transferred, but remains in the bargainor and covenantor. *Doe v. Passingham*, 6 Barn. & Cress. 305 ; and see *Mr. Butler's* valuable note to *Co. Litt.* 271, b. note 231, s. 3.]

to the use of a corporation would not be good without licence, as it would be within the Statutes of Mortmain.

4thly, There must be *privity of estate*; for he who comes in, in the *post*, or paramount the person limiting, shall not be subject to it.*

* Prior to the Statute of Uses (27 *H.* 8, *c.* 10) the mode of evading the common law restraints on testamentary disposition (the Statute of Wills not being enacted till the 32d year of the same reign) was by making a feoffment to *A.* his heirs and assigns, to such uses as the feoffor should appoint. The appointment usually contained a power of revocation, when it did not confer an immediate interest, so that the power was in fact kept open till the appointor's death. In effect, this mode of evading the common law was equivalent to the will of the present day, and was generally used in the same manner, and for the same purposes. With reference to the text, if *A.* the feoffee died without heirs, the legal estate in him escheated to the lord of the manor whereof the lands were holden; and all lands, whether freehold or copyhold, were then, as well as now, holden of some manor. As between the lord and the *cestui que use* there was neither privity of estate nor person; it was on the seisin of *A.* and his heirs that the use was raised; *that* seisin having failed, the use fell to the ground. The heirs and assigns of the feoffee came in, in the *per*, that is *by* or *through* him, and were bound by the privity and confidence which subsisted between their ancestor and the *cestui que use*; but the lord by escheat came *in*, by title paramount, and was, therefore, said to claim in the *post*, that is, beyond or without such privity, and he consequently held discharged of the use and confidence which he never agreed to. But now the seisin and use, the moment they are created, are instantly united

[*Co Litt.* 270, b.
Bull. n. (1),
s. 2.]

5thly, There must be a *privity of person*; for a purchaser *without notice* shall not hold charged.* Fearne, 324, 325.

There cannot be *an use upon an use*. If an estate be limited to *A. B.* and his heirs to the use of *C. D.* and his heirs, to the use of *E. F.* and his heirs, the statute shall execute *only the first use*, or that to *C. D.*, and the limitation to *E. F.* will be only *a trust* in equity.†

by the operation of the Statute of Uses, and therefore the requisition in the text is at this day merely nominal.

* That is, a purchaser for valuable consideration. A volunteer without notice of the use, and a purchaser for value with actual notice of it, were equally bound to render the profits of the land to the *cestui que use*, and to convey as he should appoint; but since the statute this distinction as to uses is almost nugatory. As to trusts, which at present occupy the exact situation of uses formerly, this and the preceding rule are applicable.

† If the limitation to *E. F.* and his heirs be intended as *a trust*, it would be prudent to give the estate to *A. B.* and his heirs, to the use of *C. D.* and his heirs, in trust for *E. F.* and his heirs; for if it be given to *A. B.* and his heirs, *to the use of himself (A. B.) and his heirs*, to the use of, or in trust for *E. F.* and his heirs, it might be open to the objection, that *A. B.* would be *in, by the common law*; and so the limitation of the use *to him and his heirs* be nugatory; and that, consequently, the limitation to *E. F.* would in such case be, in fact, *the first use*, and executable by the statute; and, consequently, that *E. F.* would take *the legal estate* to him and his heirs.—Note by Mr. WATKINS.

[The case of *Doe v. Passingham*, 6 Barn. & Cress. 305, settles the question raised in the preceding note. In that case an estate upon the marriage of *A.* and *B.* was conveyed

2 Bl. Com. 336.

Upon this principle, however absurd in itself, many important doctrines are founded. Hence, if it be wished that a person shall have only a *trust estate*, care should be taken to limit a preceding, and at least commensurate, use, so as to be executed by the statute ; as, “ to *A. B.* and his heirs, *to the use of him and his heirs during the life of C. D.* in trust for *C. D.*, and from and after the decease of the said *C. D.* to the use of the heirs of the body of the said *C. D.* ;” when *C. D.* would take a trust or equitable estate only ; and the remainder to the heirs of his body would be

to *C.* and *D.* and their heirs, to the use of *C.* and *D.* and their heirs, upon trust nevertheless, and subject to the several uses, &c., after mentioned ; namely (after the marriage), to the use of *A.* and *B.* and to the survivor for their lives, remainder to the use of two other trustees, for 1000 years, for raising portions, remainder to the use of the first and other sons of the marriage successively in tail male : remainder to the use of the daughters, &c., remainder to the use of *A.* and his heirs : there was no limitation to trustees to preserve. The question was, whether the trustees took the legal estate. It was contended, that the first use to the trustees was absorbed and extinguished in their seisin, and had, therefore, no effect in preventing the operation of the statute upon the second set of uses ; but the Court of K. B. decided that the trustees took the legal estate by the *common law*, and that the subsequent limitations were all trusts. The ignorant penning of the settlement was thought to leave the intention of the parties doubtful ; but upon this point *Holroyd, J.*, observed, “ that even if it were intended that the deed should operate in a different mode from that pointed out by the law, when the legal estate is given to the trustees, that intention cannot countervail the law.”]

a proper use, executed by the statute the moment he died. And the estate to him being equitable, and that to his heirs legal, could not unite; and so the latter would not be barrable by him.

Hence, also, a use cannot be limited on a *bargain and sale* to any but the *bargainee*; for, till inrolment, the bargainee himself has but a use, and he can not be seised of an use to the use of another person;* and the limitation over would be a trust; and so as to a *covenant to stand seised*. If, therefore, it be intended that a third person should take an use executable by the statute, some other species of conveyance (as a *feoffment*, or *lease and release*) should be had recourse to.

* If a will were made between the date of a bargain and sale, conveying the property to the testator, and the inrolment of that bargain and sale, a question has arisen whether the testator could be said to be *seised* of the estate at the date of his will, if he died before inrolment, supposing inrolment to be made within due time after the execution of the bargain and sale, *Bellingham v. Alsop*, *Cro. Jac.* 52. *Flower v. Baldwin*, *Cro. Car.* 218. *Iseham v. Morrice*, *Cro. Car.* 110.

However, it is considered clear from other adjudications, and particularly from *Dimock's* case, *Hob.* case, 182, that where the *heir* of the bargainee was adjudged entitled to lands conveyed to his ancestor by bargain and sale, inrolled after the ancestor's death, that the *devisee* was entitled to lands under a will made in the interval between the date of the bargain and sale and its inrolment; for that the estate vests presently by the Statute of Uses, and not by the Statute of Inrolments, except where the bargain and sale was made by commissioners of bankrupt: in that instance nothing passed till inrolment. *Bennet v. Gandy*, *Carth.* 178.

[By the statute 7 & 8 *Vict. c. 76, s. 2*, it is enacted, that *every person may convey by any deed without livery of seisin, or inrolment, or a prior lease, all such freehold land as he might before the passing of the act have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release: provided that every such deed shall be chargeable with the same stamp, as would have been chargeable, if such conveyance had been made by lease and release.**]

[* The very general language of this clause, coupled with its want of precision, has suggested the question, whether the Legislature by it, intended to assimilate the operation of every form of conveyance of freehold estate; and consequently whether a deed in the form of a bargain and sale, or a covenant to stand seised, (taking effect as if it had been made by lease and release), would operate by transmutation of seisin; whether in fact the use, under those forms of conveyance, may be limited to any but the bargainee or covenantee. The probable conclusion is, that the Legislature did not intend to interfere with the technical construction of any of the various forms of conveyance then employed, but merely to authorize a conveyance under the act, without the accompaniments of livery of seisin, inrolment, or lease for a year, and to have the effect of a lease and release, leaving unaffected the technical operation of all other deeds relating to real property, not within the act. If this be the true construction of the clause, a deed intended to operate as a bargain and sale, with inrolment, and the covenant to stand seised, will have the same technical operation, as instruments not operating by transmutation of seisin, as they had before the act came into operation: but it is probable that this enactment will practically have the

An use need not take effect immediately on the creation of the deed, like an estate of freehold. It may commence *in futuro*; for the freehold remains in the [grantor], covenantor, or bargainor, who is to answer to the *præcipe* of others, and perform the feudal duties. But the contingency [or event] upon which the use is to arise must be such as may happen within a reasonable period, as a life or lives in being, or twenty-one years afterwards;* and uses so limited are called *contingent* or *springing uses*, which [previously to the 7 & 8 Vict. c. 76, s. 7, 8, might have been] destroyed or defeated *by destroying the estate out of which they are to spring*.†

effect of assimilating the forms of all conveyances of real estate: *vide infra*, ch. *Feoffment and Bargain and Sale*.]

* Except where the future use is to take effect after an estate tail, as then no danger of a perpetuity will accrue—the tenant in tail having power to bar the estate tail and all remainders future and springing uses dependent thereupon: *vide supra*, pp. 212, and 213, note. Fearn, 443.

† As if a person, in consideration of an intended marriage, covenant to stand seised to the use of himself and his intended wife for life, with remainder to the first and other sons of the marriage in tail, and before the solemnization of the marriage makes a feoffment in fee or a lease for life, upon a valuable consideration, to a person who has no notice of the covenant, the uses to arise upon the marriage will be destroyed, because the seisin to feed them has been swept away by the feoffment. 2 *Sidf.* 64. 2 *Roll. Abr.* 796. *Cro. Jac.* 168. But this doctrine is now principally applicable to covenants to stand seised, and uses arising under powers, which are clearly not exercisable, if the privity between the seisin and the use be destroyed by disseisin. This subject involves much technical learning connected with the unsettled

See as to shifting the second estate on the accession to the family estate, *Bull. n. to Co. Litt.* 327, a.

An use may also be limited so as *to change after execution, to another person*; as to the use of *B.* for life, remainder to his first and other sons

doctrine of *scintilla juris*, and is treated of in 2 *Cru. Dig.* 259, &c. 276, 305, 4th ed. 1 *Sand. Uses*, 146, 4th ed. *Cornish, Uses*, 135.

[A springing use is not necessarily contingent; it may arise upon a future event, either certain or contingent.] Thus, under a conveyance to *A.* and his heirs, to the use of *B.* and his heirs from and after next Michaelmas, the use to *B.* is future and springing, but it is not contingent. Till next Michaelmas the use results to the grantor—on the arrival of the time it shifts to *B.* But if the conveyance had been to *A.* and his heirs, to the use of *B.* and his heirs from and after next Michaelmas, *provided B. be then living*, this is a contingent springing use.

Contingent uses also engender the doctrine of *scintilla juris*, as above hinted, which may be shortly explained thus:—Suppose a feoffment be made to *A.* in fee, to the use of *B.* during his life, with remainder to the use of his sons (unborn) successively in tail; and for want of such issue to the use of *C.* in fee. The remainders to the sons are contingent uses, and are therefore unexecuted; yet, being in truth nonentities, they do not impede the vesting and execution of the ultimate use in *C.* [Some authorities favour the hypothesis, that as there is a possibility of the intermediate contingent use arising, so the feoffee, releasee, &c. must have a corresponding possibility of seisin, to serve the contingent use when it arises. 1 *Co. Rep.* 120. *O. Bridg.* 382. 1 *Sand. Uses*, 101. The editor considers that *Sir Edw. Sugden*, in his *Treatise on Powers*, ch. 1, s. 3, successfully combats this hypothesis; and he conceives that the true construction of the Statute of Uses, and that which corresponds with the practice of the Profession, is this, that there is no necessity for a continued seisin in the feoffees, &c., in order that there may be in existence, at the moment the contingent use is to arise, a

in tail, remainder in fee ; *provided that if there be no issue living at the death of B. then to the right heirs of C. for ever.* And this is called a *shifting* or *secondary* use ; but like the latter it must take effect, if at all, within a life or lives in being or one and twenty years afterwards.

If such shifting use be limited on an estate *in fee*, it *cannot be destroyed or barred by the previous taker* ; but if on a limitation *in tail*, it may.

And so with respect to *trusts* : some are completely established, and so as to take effect immediately, by the very deed which conveys the legal estate to the trustee ; and are, therefore, frequently called trusts *executed* : while others are to be carried into execution by some future act to be done by the trustee ; and these are often denominated trusts *executory*. Trusts of the *first* description, *have the same construction as legal estates* ; while those of the *latter*, *are carried into execution so as best to answer the intention of the person creating them*.*

Fearne, 139,
140.

Supra p. 144, n.

seisin to serve or supply that use ; but, on the contrary, that the original seisin in the feoffees, &c. being commensurate with the whole fee, was sufficient upon the execution of the feoffment, release, &c. to give complete effect to all the limitations, as well to those which are future as to those which are immediately executed ; thus drawing out of the feoffees, &c. the entire seisin, and at once giving legal efficacy to the whole series of limitations.]

* Of this character are *covenants* to assign or surrender

When an use is wholly or partially undisposed of, it shall result to the grantor.

leasehold or copyhold lands to certain trustees, upon trusts to correspond with uses previously limited of freehold estates. But an assignment or surrender actually made to trustees upon trusts to correspond with uses of freehold property would, it is apprehended, confer trusts *executed*. The distinction between trusts executed and trusts executory is, that the former cannot afterwards be varied by the interference of a Court of equity; whereas, trusts *executory* are liable to be altered or modified by a Court of equity, whenever they do not technically carry into execution the presumed object of the parties. On this ground, all covenants to surrender copyhold estates on trusts must be considered executory, and liable to be moulded or remodelled, according to the nature of the transaction and the manifest intention. Indeed, all covenants participate very deeply in this executory character. "At law, a covenant must be strictly and literally performed; in equity, it must be really and substantially performed, according to the true intent and meaning of the parties, as far as circumstance will admit." 3 *Ves.* 692.

In the *Duke of Newcastle v. Lincoln*, 3 *Ves.* 387, a conveyance of freehold estates was made in consideration of marriage, to uses in strict settlement, with a covenant to assign leasehold estates to trustees, "in trust for such person or persons, and for such other the like ends, intents, and purposes as were thereinbefore mentioned of and concerning the said freehold messuages, &c., as far as the law would in that case permit." *Lord Rosslyn* thought that the settlement should be so framed that no person, being tenant in tail by purchase, should become entitled to a vested interest in the leasehold estate, until he attained twenty-one, or died under that age, leaving issue inheritable to the entail, 3 *Ves.* 387. On appeal, the Lord Chancellor observed, that a Court of equity would give a construction to an executory covenant of this kind, agreeably to

The *cestui que trust* may transfer his interest over to a stranger; and if such *cestui que trust*

Pigott, 104.
 1 *Coll. Javid.*
 214. 3 *Ves.*
 120. 5 *Cru.*
Dig. 384, ed. 4.

what would have been the direction of a conveyancer consulted by the party: and, alluding to the distinction between trusts executed and executory, his Lordship added, that if the party would be his own conveyancer, and *create the estate*, the Court had no jurisdiction to alter that estate so created by the party himself: but, upon such a covenant as this, the Court had jurisdiction to execute the intention when it could see it: citing *Gower v. Grosvenor*, *Barn. Ch. Ca.* 54. 12 *Ves.* 218. See also 1 *Jac. & W.* 570. 1 *Sand. Uses*, 310, 4th ed. 2 *Watk. Cop.* 307, 313.

In the case of articles of agreement made in contemplation of marriage, and which are, consequently, preparatory to a settlement, and in the case of wills which are merely directory of a subsequent conveyance, the trusts declared by them are said to be executory, because they require an ulterior act to raise and perfect them. They are rather considered as *instructions* for settlements than as instruments complete in themselves; and the Court of Chancery, in order to promote the presumed views of the parties in the one case, and to support the manifest intention of the testator in the other, will attach to the words expressive of the trusts, a more liberal and enlarged construction than it would do if the words were contained in a limitation of a legal estate or a trust executed. 1 *Sand. Uses*, 310, 4th ed. Thus, in *Jervoise v. the Duke of Northumberland*, 1 *Jac. & W.* 570, the Lord Chancellor observed, that where there is an executory trust, as, for example, where a testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court of Chancery has been in the habit of looking to see what was his intention; and, if what he has done amounts to an imperfection, the Court will mould what remains to be done, so as to carry the intention into execution. His Lordship con-

were tenant in tail in possession, he [might, previously to the statutes abolishing fines and recoveries,] even suffer a *common recovery*, though there were no legal tenant to the *præcipe*; so he might levy a *fine*.* [Now by a deed of disposi-

tinues:—There is a good deal of confusion in the expressions “trusts *executory*” and “trusts *executed*.” The latter, no doubt, in one sense of the word, is a trust executory; that is, if *A. B.* is a trustee for *C. D.*, that is a trust executory in this sense, that *C. D.* may call upon *A. B.* to make a conveyance and execute the trust: but in cases like the above, the testator has clearly decided what the trust is to be, and the trust is then said to be executed; and where a trust is executed, the Court of Chancery follows the law. 1 *Jac.* § *W.* 570. Upon the subject of the preceding note, see *Rop. Leg.* vol. ii. 455, ed. 1828.

* If an estate were conveyed unto and to the use of *A.* and his heirs, in trust for *B.* in tail, with remainder over, *B.* [might previously to the above acts] suffer an equitable recovery without *A.*’s concurrence, and thus acquire the equitable estate in fee. He might then call upon *A.* for a conveyance of the legal estate, and thereby extinguish the equitable in the legal ownership, of which he would then become seised in fee simple. *Ca. temp. Talb.* 164, 167. [In the case above supposed, *B.* may now by a deed of disposition in conformity with those acts acquire the absolute fee without the concurrence of *A.*, who is a bare trustee, and therefore not protector by s. 27, of the statute 3 & 4 *W.* 4, c. 74, nor within the exception of s. 31. The corresponding sections in the Irish act, 4 & 5 *W.* 4, c. 92, are the 25th and 29th.] On the other hand, if a trustee, who had the legal estate in fee in trust for a married woman and her heirs, made his will, and devised this legal estate to his eldest son in tail, with remainders over, a recovery must have been suffered by the son before the feme covert or

tion in conformity with those statutes, he may bar an equitable estate tail in the same manner as if it were legal.]

In certain cases the *cestui que trust* may call in the legal estate, and, by a bill in equity, oblige the trustees to convey. *Fearne, C. R.*
333. 1 *Sand.*
371, ed. 4.

In some cases it is proper to keep the legal estate outstanding, in order to guard against mesne incumbrances, &c. This is usual with respect to terms of years, which should generally be kept on foot for the security of the purchaser; and in such cases, carefully assigned to a person of his own nomination in trust to attend the freehold or inheritance,* it being a rule

her husband could obtain the dominion over the legal fee. It was not necessary, till a comparatively recent period, to suffer a recovery of an equitable estate tail. 1 *P. Wms.* 91, 2 *Vern.* 552. See also 2 *Ch. Ca.* 63, 78, and 1 *Fonb. Tr: Eq.* 303, 5th ed. Before that period the equitable tenant in tail might have obtained a conveyance of the legal estate from the trustee, which, absorbing the equitable estate, was considered as destroying the estate tail. But subsequently a recovery was indispensably requisite. 1 *Bro. C. C.* 70. 1 *Vern.* 13. 2 *Vern.* 132. *Amb.* 518. 3 *Ves.* 120. 16 *Ves.* 224. 2 *Meriv.* 358. *Merest v. James, Mad. & Geld.* 118, *et infra*, *Ch. Rec.*

* See *ante*, Ch. *Terms for Years*, pp. 50, 54, for observations on this head. It has lately been decided, that the person who has the best right to call for an assignment of the legal estate, obtains no priority by that right, unless he pro-

that, where there is equal equity, he who has the legal estate shall prevail.*

cures an actual assignment of the term. *Frere v. Moor*, 8 *Price*, 475.

* As if there are several mortgages on one estate, the last mortgagee having lent his money upon a valuable consideration *without notice*, may, by purchasing the preceding incumbrance *which carries with it the legal estate*, protect himself against any mortgage subsequent to the first, and prior to the last; for, by purchasing the first mortgage, he obtains the legal estate, and he had equal equity with the mesne incumbrancer by having lent his money without notice of his charge; and notice of the mesne incumbrance at the time of buying in the first mortgage will not vary the case. *Bovey v. Skipwith*, 1 *Ch. Ca.* 201. *Churchil v. Grove*, *ibid.* 35. 1 *Vern.* 187, 188. 2 *Ves.* 573. *Hagshaw v. Yates*, *Stra.* 240. But the possession of the legal estate will not make up for the want of *equal* equity, and notice of a prior charge at the time of the subsequent advance will make the equities of two incumbrances unequal. Where a person advances money on an estate which he knows to be already incumbered, he in effect acknowledges that he will claim subordinately to the person who has the prior charge; and therefore it may be laid down as a general rule, that if the subsequent incumbrancer have notice of the preceding incumbrance *before* he becomes possessed of his own security, nothing he can do will help him. *Vide* 2 *Ves.* 485, 684. [See 2 *Cru. Dig. Ch. V.* ed. 1835.]

A case lately occurred, where a conveyance had been made to *A. B.* to uses to bar dower. *A. B.*, on his second marriage, appointed and released the estate to the use of himself for life, with remainder to the use intent and purpose that his intended wife might thereout receive and take an annuity of 1500*l.* a-year, if she should survive the said *A. B.*, and subject thereto, to the use of the said *A. B.* in fee, but with power for

If a trust and legal estate unite in the same person, the former, generally speaking, becomes merged or extinguished.

Woth. on Desc.
191. *Brydges*
v. Brydges,
3 *Ves.* 120.
Merest v.
James, 1 Mad.
8. *Geld. Rep.*
118. [6 *Cru.*
Dig. p. 496,
ed. 4.]

the wife, notwithstanding her coverture, to levy and raise the sum of 2000*l.* out of the estate for the use of the children of the intended marriage, and to appoint any term of years therein to any person for better raising the same as she should think fit. On the solemnization of the marriage, the settlement was handed over to the wife, who kept it in her own bureau, but the husband retained the title deeds and the conveyance to himself in fee. A year or two afterwards, the husband borrowed a sum of 3000*l.* on the estate, which he represented to be free from incumbrances. The mortgagee had no notice of the settlement, and it was not necessary for him to inquire about the dower of the borrower's wife, as the conveyance to him was to the common uses to bar dower. Some time after, the husband became bankrupt, when the mortgagee made his appearance and commenced an ejectment for the recovery of the estate. After the bankruptcy, the wife exercised her power of appointment, limiting the estate to a trustee for a term of five hundred years, in trust by sale or mortgage to raise the sum of 2000*l.* The term was limited to commence the day after the marriage. The mortgage was in fee. The husband being tenant for life, the legal estate for his life clearly passed to the mortgagee. On the husband's death, it was considered that at law the trustee of the term would be entitled to recover in ejectment; but in equity, it was thought that the mortgagee, being in the character of a purchaser for valuable consideration without notice, would be entitled to an injunction to stay proceedings against him at law, on the ground that the trustees of the settlement had been guilty of negligence in permitting the husband to retain the possession of the title deeds; but this opinion was given with some reservation,—the late case

In conveyances creating trusts there should be clauses enabling the trustees to deduct expenses; and sometimes an express allowance should be given them for their time and trouble; that they shall not be answerable for monies not actually received by them, or for what shall be lost without their fault.* It is frequently necessary also

of *Harper v. Faulder*, 4 *Madd.* 129, being taken to qualify the general doctrine laid down in 2 *Black. Com.* 160, n. respecting the degree of negligence necessary to postpone a person for not taking the title deeds. See also *Strode v. Blackburne*, 3 *Ves.* 222. *Martinez v. Cooper*, 2 *Russ.* 198; and 1 *Pow. Mortg.* 57, a, 472, n, 2 *ib.* 637. *Coote Mortg.* 511. ed. 2.

[See 7 & 8 *Vict.*
c. 76, s. 10.]

* Also, that their receipts should be good discharges; and that all persons paying them monies and taking such receipts, should not be required to see to the application of the money therein expressed to be received; also, that it shall be lawful for the trustees to invest any monies remaining in their hands, not immediately applicable to any of the purposes of the trust, in the funds, with power for them to alter and vary the securities as they shall think fit, and a provision for the change of trustees as occasion shall require. The statute 1 *W.* 4, c. 60, consolidates and amends the laws relating to conveyances and transfers of estates and funds vested in trustees who are infants, idiots, lunatics, or trustees of unsound mind, or who cannot be compelled, or who refuse to act.

[The 8th sect. of the act authorizes the Court of Chancery to appoint a person to convey in the place of a trustee, or of the heir of a trustee out of its jurisdiction, or who is not known; and it was decided, that this section did not apply to the heir of a *mortgagee* out of the jurisdiction, *In Re Dearden*, 3 *Myl. & K.* 508, or who is not known, *In Re*

to give them power, either with or without con-

Goddard, 1 *ib.* 25. In *Re Stanley*, 5 *Sim.* 320: nor to a devisee of a mortgagee refusing. *Ex parte Payne*, 6 *Sim.* 645: nor to constructive trustees. In *Re Dearden*, *ubi supra*. Upon the further construction of this clause see *Re Merry*, 1 *Myl. & K.* 677. The statute 4 & 5 *W.* 4, *c.* 23 (27th *June*, 1834), assuming that mortgagees and the heirs of mortgagees were included in the above section, provides that where any person seised of any land upon any trust or by way of mortgage dies without heir, the Court of Chancery may appoint a person to convey such land, in like manner as is provided by the 11 *G.* 4, and 1 *W.* 4, in case such trustee or mortgagee had left an heir, and it was not known who was such heir. In *Ex parte Whitton*, 1 *Keen*, 278, *Lord Langdale*, M. R., was of opinion that an unknown heir of a mortgagee was within the meaning of the 8th sect. of the 1 *W.* 4, *c.* 60, explained by the 4 & 5 *W.* 4, *c.* 23. The statute 1 & 2 *Vict.* *c.* 69, was passed to remedy, in certain cases, the doubts which had arisen, whether the preceding statutes extended to them. The 1 & 2 *Vict.* provides that where any person, seised of any land by way of mortgage, shall have died without having been in possession or in receipt of the rents, and the mortgage money shall have been or shall be paid to the executor or administrator, and the devisee or heir or other real representative or any of the devisees or heir or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several devisees or representatives, who were joint-tenants, which was the survivor, or whether any such devisee heir or representative be living or dead, or, if known to be dead, it shall not be known who was his heir, or where such mortgagee or any such devisee or heir or representative shall have died without heir, or shall neglect or refuse to convey for 28 days after tender of a proper

sent, to sell or exchange the lands, or transfer stock, &c.*

deed, then the Court of Chancery may direct a person, in the place of such devisee heir or representative, whether having a beneficial interest in the mortgage money or not, to convey in the manner provided in the 1 *W.* 4, c. 60, for the cases therein mentioned. By the 9th sect. of stat. 7 & 8 *Vict.* c. 76, the executor or administrator of a mortgagee not in possession is empowered, on discharge of the mortgage, to convey or surrender the legal estate vested in the heir or devisee of such mortgagee, or in the heir devisee or other assign of such heir or devisee.]

* It may be observed, that the investment of trust-money on personal security, without an express provision empowering that act, is a breach of trust. But it is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* cannot afterwards complain of the breach of trust; and either concurrence in the act, or *acquiescence* without original concurrence, will release the trustees: but that is only a general rule, and a Court of equity will inquire into the circumstances which induced concurrence or acquiescence; recollecting, in the conduct of that inquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude. *Walker v. Symonds*, 3 *Swans.* 58, 64.

[It may be useful to the student here to notice in what cases a preceding declaration of uses may be controlled by one subsequently made. In a feoffment, lease and release, and grant, the declaration of the use is almost universally contained in the conveyance itself; covenants to stand seised, and bargains and sales, are necessarily declarations of the use. But with respect to fines and recoveries the case is different ;

[See *Eales v. Coun*, 4 *Sim.* 65.]

and upon these modes of assurance the question has frequently arisen between preceding and subsequent declarations of the use. Where a deed contained a covenant to levy a fine, the uses were generally declared by that deed, which was called a deed to lead the uses of the fine ; but where there was no covenant, nor any agreement in a deed prior to the fine, of course the declaration of the uses of the fine must have been subsequent. With regard to recoveries, the declaration of the uses was generally contained in the deed to make a tenant to the *præcipe*, which was then said to lead the uses of the recovery ; but sometimes the uses were limited by a subsequent deed, which was called a deed to declare those uses.

The uses of a fine or recovery might have been varied, or even absolutely revoked, before the fine was levied or recovery suffered, by a deed of as high a nature as the preceding declaration ; the fine or recovery being conformable in time, persons, and other circumstances, with the deed leading the uses of it, *Countess of Rutland's case*, 5 Co. 26, a ; and by the consent of all parties interested, *Touch.* 519. *Stapilton v. Stapilton*, 1 Atk. 2. *Houghton v. Tate*, 3 Yo. & Jer. 486.

Where the fine or recovery varied in time, persons, or other circumstances, from the preceding declaration, the uses might have been varied previously to the fine or recovery by another instrument, though not a deed, but merely a writing, *Jones v. Morley*, 2 Salk. 677, and though all persons interested in the first were not parties to the subsequent instrument, *Countess of Rutland's case*, *ubi supra*.

Where the fine or recovery did not vary in time, persons, or other circumstances, from the deed leading the uses of it, the use was fixed accordingly as soon as the fine was levied or recovery suffered ; a subsequent declaration would not control its operation. *Touch.* 520. 2 Salk. 676. 9 Co. 10, b. 11, a. 1 Atk. 9.

Where there was no preceding limitation of the uses of the fine or recovery, it might have been subsequently declared by deed (4 Ann. c. 16, s. 15) ; and it does not seem clear that it might not have been varied by a deed subsequent to the pre-

ceding declaration ; second resolution in *Tregame v. Fletcher*, 2 *Salk.* 676. *Touch.* 521. 3 *Dyer*, 307, b ; but of course not to subvert any mesne estate. *Touch.* 519. 9 *Co.* 11, a.

Where there occur conflicting declarations of the use in the *same* instrument, the first shall prevail ; the maxim is, the first deed and the last will. *Doe v. Biggs*, 2 *Taun.* 109. See 3 *Taun.* 376. 3 *Russ.* 399.

It has not unfrequently occurred in practice, that in a conveyance to a purchaser to the usual uses to bar dower, there is a covenant to levy a fine, and the uses of the fine are declared to the purchaser and his heirs, or to him and his trustee and their heirs, nevertheless, as to the estate of the trustee and his heirs, in trust for the purchaser and his heirs. It is conceived that the fine would be considered only by way of further assurance, and that the limitation in the *habendum* would prevail. *Southcoat v. Manory*, *Cro. Eliz.* 744. *Moor*, 680. *Wilmot v. Knowles*. But *Mr. Sanders* thought it more doubtful, if the fine were levied of a term preceding the execution of the deed. *Sir James Perrot's* case, 22 *Vin. Abr.* 227, pl. [9.] 8. *Clever v. Gyles*, *Cro. Eliz.* 300. See 1 *Sanders on Uses*, 219—229, ed. 4.

Where two acts of Parliament which passed during the same session, and were to come into operation on the same day, are repugnant to each other, that which last received the royal assent must prevail, and be considered *pro tanto* a repeal of the other. 2 *B. & Adol.* 818. See also *Paget v. Foley*, 2 *Bing. N. S.* 679.

The student is referred to the two tables in the following pages, which may assist him in understanding the effect of the Statute of Uses, in the various forms of conveyance which do, and which do not operate by transmutation of possession or seisin ; the intention being, in the following example, No. 1, that under each of these modes of conveyance the seisin should be in *A*, the use or legal estate in *B.*, and the trust estate or equitable ownership in *C.*, so that they may take the same interests, or stand in the same character in each conveyance.

In the table No. 2, the student will see the different effects under the statute upon the interests of the persons taking under a limitation to *A.* and his heirs, to the use of *B.* and his heirs, to the use of or in trust for *C.* and his heirs, by a declaration of the uses of a fine or recovery, by a feoffment, lease, and release, grant, bargain and sale, covenant to stand seised, and an appointment. With respect to the effect of the 2nd section of the stat. 7 & 8 *Vict. c. 76*, upon the technical operation of the two conveyances, which do not operate by transmutation of seisin, the reader is referred to the note on page 250.]

No. I.

In order that	A. may have the seisin,	B. the use or legal estate.	C. the trust estate, or equitable ownership.	
In a fine	A. must be Conuzee.	B. <i>Cestui qui use</i> by the deed leading or declaring the uses of the fine.	C. <i>Cestui qui trust.</i>	Operating by transmutation of possession or seisin.
Recovery,	Recoveror,	the same of the recovery.	the same as above.	
Feoffment,	Feoffee,	<i>Cestui qui use.</i>	<i>Cestui qui trust.</i>	
Lease and Release,	<i>Releasee</i> , who is of course the lessee or bargainee for a year.	same as above.	same as above.	
Grant,	Grantee.	same as above.	same as above.	Not operating by transmutation of possession, or rather seisin.
Bargain and Sale, }	Bargainor,	Bargainee.	same as above.	
Covenant to stand seised.	Covenantor,	Covenantee being <i>cestui qui use.</i>	same as above.	
Appointment.	The Releasee, Grantee, &c. to uses in the deed creating the power of appointment.	Appointee.	same as above.	

No. II.

	To A. and his heirs.	To the use of B. and his heirs.	To the use of, or in trust for C. and his heirs.	
In a Fine } Recovery. } declared to enure to the use of	A. will take the use.	B. nothing.	C. the equitable fee.	Operating by transmutation of seisin or possession.
	A. will take the same as above.	B. nothing.	C. same as above.	
Feoffment.	A. will take the <i>seisin</i> .	B. the <i>use</i> .	C. same as above.	
Lease and Release. }	the same	as	above.	
Grant.	the same	as	above.	
Bargain and Sale. }	A. will take the <i>use</i> .	B. nothing.	C. the equitable fee.	Not operating by transmutation of seisin or possession.
Covenant to stand seised. }	the same	as	above.	
Appointment.	the same	as	above.	

CHAP. XXI.

OF POWERS.

*Butl. n. (1) to
Co. Litt. 342, b.
& add. n. to 271.
Booth's Opin.
at the end of
Touchst. and
1 Coll. Jurid.*

A POWER is an authority expressly reserved to the grantor, or expressly given to another, to be exercised over lands, &c. granted or conveyed at the time of the creation of such power.*

* It is either a common law authority, or (in the more usual sense) an authority deriving its effect from the Statute of Uses. It is of the latter kind that the Author treats in this chapter. Of the former may be instanced an authority to sell lands given to executors to whom no estate is devised, and the powers conferred by particular statutes, as the Land Tax Acts, the Act enabling the Remembrancer of the Exchequer to convey lands extended, &c.; and it has lately been decided, that if a will contain a general direction to sell land, and it is not stated by whom the sale is to be made, if the produce of the sale is to be applied by the executors in the execution of their office, they will be considered as having the power of sale, and will be enabled to make a good conveyance of the legal estate in fee without the concurrence of the testator's heir at law. *Tylden v. Hyde*, 2 *Sim. & Stu.* 238. *Bentham v. Wiltshire*, 4 *Madd.* 44. *Sowarsby v. Lacy*, 4 *Madd.* 142. *Patton v. Randall*, 1 *Jac. & W.* 189. From these cases it is inferred, that where real and personal estate are directed to be sold, and the money applied to

[2 *Sugd. V. & P.*
30, &c. ed. 9.]

Powers are either *collateral*, or *relating to the land*; and those *relating to the land* are either *appendant* (or *annexed to the estate*) or in gross.

Powell on Powers,
2 *Fearne*, 334,
&c. in note.
1 *Sand. Uses*,
169. 174, &c.
2 *Ib.* 71—78.

Collateral powers are those which are given to *strangers*; that is, to *persons who have neither a present nor future estate or interest in the lands*.*

purposes not necessarily connected with the executorial office, yet if the money arising from the sale of both estates be directed to form one consolidated fund, the produce of the real estate is *inseparable* from the produce of the personal estate; and as the latter is in its natural course to pass through the executors' hands, so therefore the produce of the real estate must be subject to the same administration, and of a consequence that this loose devise not only empowers the executors to *sell*, but also to *convey* the legal estate in the realty to a person in fee. It is also to be inferred, that if the testator had directed the residue of his landed property only to be converted into money, and the produce applied upon the above trusts, the heir at law, on whom the legal estate would have descended, would have been the proper person to make the sale; in short, that he would have taken the estate clothed with a *trust* for the objects described. In all cases of mere authorities, it is prudent to obtain the concurrence of the testator's heir at law, if he can be prevailed on to join in the conveyance.

[*Forbes v. Peacock*,
11 *Sim.* 152.]

* Collateral powers (correctly defined by the Author) are by some called powers 'simply collateral,' or 'powers not coupled with an interest,' or 'powers not being interests.' These terms have been adopted, to obviate the confusion arising from the circumstance, that powers in gross have been by many called 'powers collateral;' an instance of which occurs in *Savile v. Blacket*, 1 *P. Wms.* 777.

Powers *relating to the land* are those reserved or given to persons who *have either a present or future estate or interest in the lands*. Those *appendant, or annexed to the estate*, are where a person has an estate in the land, and the estate to be created by the power is to take effect in possession *during the continuance of the estate to which the power is annexed* ; as to make leases.

Those in gross, are where the person to whom they are given has an estate in the land, but the estate to be created under, or by virtue of, the power is not to take effect *till after the determination of the estate to which it relates* ; as to jointure an after-taken wife.

Great care should be taken in the creation of powers, as the appointor can only act according to the authority given.* If power be given to

[* Where powers to appoint real and personal estate do not authorize an appointment to one or more of the objects of the power, in exclusion of the rest, a share must be given to each. The Courts of common law have uniformly held, that an appointment of a nominal share, however small, was valid ; but Courts of equity interposed their authority, in support of the presumed intention of the donor of the power, that each of the objects of the power should have a substantial share, and decided, that an appointment, which did not give such substantial share to each of the objects, was illusory and void. The difficulty of deciding in each case what was, and what was not, a substantial share, has been a fruitful source of litigation ; and, in order to put an end to the evils of this

husband and wife, the survivor cannot appoint ; and, therefore, if it be intended that the survivor should appoint, such power should be expressly given “*to the survivor of them.*” If a power be given to *A. B.* to appoint by deed, he cannot appoint by will ; and therefore, if it be meant that he *should* appoint by will, it should be so said.*

Cowp. 260.
[10 *Ves.* 370.
15 *Ib.* 596.
2 *Vern.* 376.
3 *Bro. C. C.*
310.]

equitable interference, the recent statute of 1 *W.* 4, *c.* 46, was passed, whereby it is enacted, that no appointment made after the passing of the act (16 *July*, 1830), in exercise of a power to appoint property real or personal among several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only was thereby appointed, or left unappointed to devolve upon any one or more of the objects of such power ; but that the appointment shall be valid in equity as at law. It is provided, that the act shall not prejudice any provision in any deed, will, or other instrument declaring the amount from which no object of the power shall be excluded.

Where under a power, not authorizing an exclusive appointment, an appointment was made of part of the fund to some of the objects of the power, and subsequently, another appointment was made of the rest of the fund to another of the objects, so as thereby altogether to exclude some of the objects ; the last appointment only is bad, and the fund thereby given will belong to the excluded objects. *Young v. Waterpark*, 6 *Jurist*, 656. See also 1 *Ves. & Bea.* 101. Per Lord *Eldon*, C.]

* Nor can a power to appoint by will be executed by deed (*Reid v. Shergold*, 10 *Ves.* 370. *Heatley v. Thomas*, 15 *Ves.* 596), unless the deed be in its nature testamentary. *Ha-bergham v. Vincent*, 2 *Ves. Jun.* 231. But a power to appoint by ‘any writing,’ or ‘any instrument,’ may be exercised by deed or will (*Roscommon v. Fowke*, 6 *Bro. P. C.*

If the power be simply to designate a person, or the like, it should not be clogged with many ceremonies; but if collusion or influence be feared, it would be proper to throw certain ceremonies in the way, as to require three or four witnesses “*not being menial servants,*” or the like.*

158); so, where the power is general, without any mode being prescribed. *Ex parte Williams, Jac. & Walk.* 93.

[By the 27th sect. of the stat. 1 *Vict. c. 26*, it is enacted, that a general devise of the real estate of the testator, or of real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.]

* No particular ceremonies are prescribed by law for the valid execution of powers. A power may be given to be exercised by note in writing, or by will unattested, [if made before the first day of *January*, 1838; but the law is now altered as regards wills made on or after that day by the 10th section of the stat. 1 *Vict. c. 26.*] *Wilkes v. Holmes*, 9 *Mod.* 485. *Hawkins v. Kemp*, 3 *East*, 439. But a person could not reserve to *himself* a power to appoint real estate by

Again; it should be considered whether the estates to be taken under the power, when exe-

will attested otherwise than according to the Statute of Frauds (*Habergham v. Vincent*, 2 *Ves. jun.* 231): and where the power affected real estate, and was to be exercised by will 'duly executed,' or 'by will' only, the will must have been executed according to the statute. *Longford v. Eyre*, 1 *P. Wms.* 740. [These observations apply only to wills made before the above-mentioned day. But the late statute in reference to wills made upon that day or since, requires uniformity of execution in every species of testamentary instrument.] The ceremonies usually prescribed, [where the power is given to appoint by deed are] that the deed or instrument by which it is exercised should be sealed and delivered by the appointor, in the presence of and attested by two or more credible witnesses; or where a power was given to appoint by will, [according to the old law it was usual to prescribe that it should] be signed and sealed by the testator, in the presence of and attested by three or more credible witnesses; [but now the sealing is unnecessary, and only two witnesses are required to attest under the late act.] The donor of the power might, however, clog the execution of it with any ceremonies his caprice might dictate, all of which must have been strictly complied with, unessential and unimportant as they might be in themselves. *Hawkins v. Kemp*, 3 *East*, 430. Hence the instrument by which the power is executed, should detail the ceremonies required, and notice the compliance with them; and in some cases this is indispensable, as when a deed is required to be *signed* as well as sealed and delivered in the presence of and attested by witnesses, each of these facts must be noticed in the attestation of the deed. *Wright v. Wakeford*, 17 *Ves.* 454. So also the attestation of a will must have noticed the publication, if that ceremony were required by the power. *Stanhope v. Keir*, 2 *Sim. & Stu.* 37: [but under the late act that is not

cuted, are to be legal estates or mere *trusts*: if the *former*, the estates should be conveyed by the deed creating such power to the trustees and their heirs, *to such uses as A. B. shall appoint*; and then, on the appointment, *the statute will execute the use*: if the *latter*, the legal estate should be placed in the trustees; as to *A. and his heirs, to the use of B. and C. (the trustees) and their heirs,** to and upon such trusts, and for such estate or estates, ends, intents, and purposes, as *D. shall appoint*, as the use would then be *executed in the trustees*, and the estates taken under the appointment would be *trust estates only*.†

requisite.] An act of Parliament (54 G. 3, c. 168,) was passed shortly after the decision of *Wright v. Wakeford*, confirming appointments executed before the passing of the act, notwithstanding the omission to express the fact of signature in the attestation, where that ceremony had been required by the deed reserving the power. But as this act is retrospective only, it is advisable to frame the power so as not to require the signature of a deed, or the publication of a will, by which it is to be executed.

[* The usual and proper mode is to convey unto *A. and B. and their heirs*, to the use of them and their heirs, upon such trusts, &c.: this gives them the legal estate at common law. *Doe v. Passingham*, 6 Bar. & Cress. 305.]

† Limitations of freehold estates made by virtue of a power are in effect springing uses, dependent on the seisin created by the deed reserving the power. An appointment conveys no estate: it merely designates a use and a person to take it, in exercise of a right reserved by the grantor to himself, or granted by him to another person; which use, when raised, the statute immediately executes. And the appointee having

By a power to appoint to *children*, the appointor cannot give an estate to *grand-children*.*

2 Ves. 640.
Alexander v.
Alexander,
4 Ves. 681.
Crompte v
Barrowe.

no estate from the appointor, is said to take under the grantor by the deed which gave the appointor his power. *Roach v. Wadham*, 6 East, 303. Appointments, in exercise of common law authorities, have a different operation: [for a common law authority empowers the person to whom it is given to transfer a seisin, upon which a use may be limited, as a conveyance from the deputy remembrancer under the 25 G. 3, c. 35.] In this point consists the principal distinction between common law authorities and powers under the statute. Thus, under a power of the latter description, an appointment to *A.*, to the use of *B.*, gives *A.* the use or legal estate, and *B.* a mere trust; but under a similar appointment in exercise of a common law authority, *B.* takes the use, which the statute immediately executes, and *A.* retains nothing.

In the case of a conveyance to *A.*, to such uses as he shall appoint, *A.* may delegate his power to *B.*, by appointing to such uses as *B.* shall appoint; his appointment amounts only to a delegation of his power to *B.*, which, as no confidence for the benefit of another was reposed in *A.* on the creation of the power, there is no rule to prevent him doing, and the statute is not called into operation until some certain use is designated by *B.*, or some future delegatee of the power, so that the final use may remain unappointed for an indefinite period of time, and no perpetuity can arise from this, because uses are vested till appointment, and the power dies with the person. 1 *Chance on Powers*, [714.]

[* But where the power is to appoint real estate to children, and is exercised by will, the donee of the power thereby appointing life estates to the children, with limitations to their first and other sons in tail, &c., the Courts will construe the will *cy pres*, in order to effectuate the general intention, by giving the children estates tail. *Pitt v. Jackson*, 2 Bro. C. C. 51. *Humberston v. Humberston*, 1 P. Wms. 332.

If, therefore, the grand-children are to take, it should be provided, that, in case *any* or *all* of the said children die before the power be executed, leaving lawful issue, the donee of the power may appoint among the children then living, and the issue of such children as shall then be dead, in such shares, &c.*

Smith v. Lord Camelford, 2 *Ves. jun.* 711. But this construction is not applied to deeds. *Brudenell v. Elwes*, 1 *East*, 451. 7 *Ves.* 382; nor to personal estate. *Routledge v. Dorril*, 2 *Ves. jun.* 364.]

* A power to appoint among children does not authorize an appointment to the executors of a deceased child (*Maddison v. Andrew*, 1 *Ves.* 57); but an appointment may be made to a child *en ventre sa mère*, or to the issue of a child, with the consent of the child. *Clarke v. Blake*, 2 *Bro. C. C.* 320. *Tucker v. Sanger*, 1 *McClelland*, 449. A power in favour of younger children excludes a younger son becoming an eldest. *Savage v. Carrol*, 1 *Ball & Beatty*, 277. Powers to appoint among nephews are subject to the same rules. *Falkner v. Butler*, *Ambl.* 514.

[In *Bray v. Hammersley*, 3 *Sim.* 513. *Aff. D. P.* 8 *Bli.* 568. 2 *Cl. & Fin.* 453, a fund was, by marriage settlement, vested in trustees in trust for all and every the children of the marriage in such shares, at such ages or times, and subject to such conditions, restrictions, and limitations, as the wife (surviving the husband) should appoint. There was only one child of the marriage, and the wife surviving, appointed the fund to that child for her separate use for life, and after her decease, to such persons as she (the child) should appoint, and in default of appointment to the executors or administrators of the child: *Sir L. Shadwell*, V. C. decided the power well executed; see also *Thornton v. Bright*, 2 *Myl. & Craig*, 230; see also 1 *Sug. Pow.* 522, &c. 4 *Cru. Dig.* 204,

So if *the appointor* die before execution, the power as to *discretion* shall cease; and, therefore in some instances, it may be prudent to provide for that event: as in case the said *A. B.* shall happen to die in the lifetime of *C. D.*, or before there be issue of *E. F.*, &c. without making any appointment, or only a partial or defective appointment, then the like power as given to the said *A. B.* shall be vested in *G. H.*, &c. Though when an execution is prevented by death, which is an act of God, a Court of equity will aid, if it be not merely dependent *upon personal discretion*.*

So it is often proper to make the power more general than is usually done: as to such uses, and for such estates, &c. as *A. B.* shall *from time to time* appoint, &c. as *A. B.* may then execute his

Powell, 263.
344.

note (a), ed. 4. *Phipson v. Turner*, 9 *Sim.* 227. *Thompson v. Simpson*, 6 *Dru. & W.* 459.

* Equity will supply the defective execution of a power in favour of a purchaser, creditor, wife, or child, but relief is not given in cases of non-execution (*Holmes v. Coghill*, 7 *Ves.* 499), unless where the power is such as a Court of equity considers as partaking so much of the nature and qualities of a trust, that it becomes the duty of the party to whom it is given to execute it; in which case, should the donee die before he has discharged that duty, the Court will supply the non-execution of the power (*Brown v. Higgs*, 8 *Ves.* 570); the general observation of the author, must, therefore, be confined to cases of the latter description.

[See *Sug. Power*, vol. 2, ch. 10, p. 94, ed. 1836.]

power *at different times*, and over *different parts of the lands*.*

So provision should be made in case of *no appointment*, or of a *defective or partial appointment*; as “and in default of such appointment, then as to such part or parts of the said premises, or to such portion or portions of interest in the same to which such appointment shall not extend, to the use,” &c.†

So if it be intended that *A. B.* should revoke his appointment, and re-appoint, power should be expressly given him, *from time to time, either wholly or partially, to revoke such appointment, and limit new uses*.‡

* The words may be introduced, but they are not indispensable. If they are omitted, the donee may execute the power partially, and at different times, so that on the whole he does not exceed the limits of his power. *Digge's case*, 1 Rep. 173. *Bovey v. Smith*, 1 Vern. 84.

† Estates limited in default of appointment are vested, subject only to be divested by the exercise of the power. *Doe v. Martin*, 4 Term Rep. 39. *Osbrey v. Bury*, 1 Ball & Beat. 53. Hence the words used by the author, or the words ‘in default of appointment, and in the mean time subject thereto, and so far as the same shall not extend,’ or simply, ‘and in default of appointment,’ are equally valid with the longer forms used by some conveyancers.

‡ The donee may exercise his power by an absolute appointment, or he may reserve a power of revocation, notwithstanding the power does not comprise the words of the text,

In the *execution* of a power it is mostly proper *to recite it*, and always to make it *apparent on the face of the instrument that it is the appointor's intention to execute and act under the power*; and, therefore, reference should be made to the premises by description, &c. And it is best to say expressly, that *under and by virtue of such power, so given, &c. and in execution of it, the said A. B. doth appoint, &c.**

See *Denn v. Roake*, 6 Bing. 475.

or any equivalent to them (*Adams v. Adams*, Cowp. 651;) but where the power is executed by deed, unless the donee reserve to himself a power of revocation, the power cannot afterwards be changed or altered, even though the original power may have given him the right of appointing and revoking from time to time. *Worrall v. Jacob*, 3 Meriv. 256. Where the power is executed by will, though it operates not properly as a will, but as an appointment of use, yet as it partakes so much of the nature of a will as to be ambulatory, revocable and incomplete till the death of the donee, it is not necessary to reserve a power of revocation to enable the donee to alter his disposition of the estate. *Oke v. Heath*, 1 Ves. 139.

* The caution of the author should be carefully attended to in practice, as by such means all question on the intention of the donee is obviated. But it is not absolutely necessary that the instrument should recite the power, or even refer to it; for if the donee does an act with all the solemnities required, and which can have no effect but by virtue of the power, it is taken to be done in execution of the power. *Dillon v. Grace*, 2 Sch. & Lef. 456. He must, however, do such an act as shows he has in view the subject of his power. *Lewis v. Llewellyn*, 1 Turn. & Russ. 104. *Jones v. Curry*, 1 Swanst. 66. [*Hunloke v. Jell*, 1 Russ. & M. 515. *Farmer v. Bradford*, 3 Russ. 354.]

Too great care cannot possibly be taken in the execution, to comply with and follow the requisite ceremonies: as if it be given to *C. D.* to appoint, with the approbation of her husband, testified by his being party to and executing the deed in the presence of three witnesses, &c. *the approbation of the husband, his being a party, his executing the deed in the presence of three witnesses, &c.* must be scrupulously complied with, and may be even stated.

And as the *excess* only, in the execution of an appointment, will be bad,* and a deficient execution cannot be extended, it is prudent *to be very full in the execution*, as the surplusage shall not, at least in equity, vitiate what would otherwise be good.

2 *Burr.* 1148.
Prec. in Chanc.
 474. *Touchst.*
 524, & *Booth's*
Opin. ibid. &
 1 *Coll. Jurid.*
 421.

If power of revocation and re-appointment be given, and the appointor execute, he may reserve in such appointment a *new power of revocation, with power also to appoint new uses*; for without this express reservation of future [power of] revocation and new appointment, the first may often be absolute.

Butl. n. (1) to
Co. Litt. 271, b.
s. iv. & n. (1)

Powers *appendant* may be *destroyed* by lease

* Thus, where a partial interest is given to an object of the power, with remainder to a person not an object, that part only is void which the power does not authorize. *Adams v. Adams, Cowp.* 651. *Brudenell v. Elwes*, 7 *Ves.* 382. *Vide supra*, p. 275, n. *Doe v. Welford*, 12 *Ad. & E.* 61.

and release, bargain and sale, and feoffment, [and previously to the stat. 3 & 4 W. 4, c. 74, as to *England*, and 4 & 5 *Ib.* c. 92, as to *Ireland*, might have been destroyed by] fine, or recovery; those *in gross* by the three latter species of conveyance, or they may be released. Powers simply *collateral* cannot be destroyed by the act of the person to whom they are given.

to 342, b. [1
P. Wms. 777.
3 *Bing.* 31.]
Smith v. Death,
5 Madd. 371.
[West v. Burn-
ney, 1 Russ. &
Mil. 431.
Bickley v.
Guest, *Ib.* 440.
Hale v. Escott,
4 Myl. & Cr.
187. Jones v.
Winwood,
3 Mee. & Wels.
653.]

And note, as the appointor is merely an instrument, the appointee shall be in by the original deed.*

2 Ves. 78. Co.
Litt. 299, b. n.
(1). 1 Fearne,
99, &c.
2 Burr. 879.

* It was stated in a preceding page, 93, that the case of *Ray v. Pung*, 5 *Mad.* 310, 5 *Bar. & Al.* 561, has decided that where a conveyance was made to *A.*, his heirs and assigns, to such uses as *B.* should appoint, and in default of appointment to *B.* in fee, *B.*'s appointment deprives *his* wife of dower. But it is apprehended, that if the conveyance had been to *B.* in fee to such uses as *B.* should appoint, and in default of appointment to *B.* in fee, the power would have been nugatory, as *B.* would take by the common law, and his wife would become entitled to dower. The ordinary mode of conveying an estate to a purchaser to uses to bar dower is free from objection. The conveyance should be to him to such uses as he shall appoint, and in default of appointment to him for life, &c. He being the releasee, the covenants are properly entered into with him, and on his appointment the benefit of them will be carried over to his appointee; and to render the concurrence of the trustee in future conveyances unnecessary, it may be contended that he is a volunteer, and therefore that his estate is void as against a subsequent purchaser for value.

[See also *Doe*
v. Jones, 10
Barn. & Cress.
459.]

[2 *Prest. Conv.*
482. 3 *Ib.* 265.
271. 494.]

[In *Goodill v. Brigham*, 1 *Bos. & Pull.* 192, an estate was devised to a married woman in fee, with a power, notwith-

standing coverture, to give, sell, or dispose of the same as she should think proper, and also to give acquittances and discharges, so as not to be under the control of her husband. The Court of C. B. decided that the power was nugatory and merged in the fee; and that the devisee could not convey, by an exercise of the power, without a fine. This decision has frequently been disapproved, and must be considered as of doubtful authority. It has been settled by recent cases that a general power of appointment and the fee may, under limitations of uses according to the statute, co-exist in the same person; and there seems strong ground to contend that a devise, such as that in *Goodill v. Brigham*, or the more technical devise to such uses, &c. as *A.* should appoint, and in default of appointment to *A.* in fee, would be supported as a good devise under the Statute of Wills. See also 1 *Sug. Pow.* 110, ed. 1836.

CHAP. XXII.

OF RENTS.

A RENT (*Reditus*) is properly a sum of money or other thing, to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion* of which is in the grantor or person demising.†

2 Bl. Comm.
41. Gilb. on
Rents.

* [By the 12th section of the 7 & 8 Vict. c. 76, it is provided, that where the reversion expectant upon any lease shall have merged in the ulterior reversion or remainder, the person in whose estate such merger shall have taken place, his heirs executors administrators successors and assigns, shall have the same remedies against the lessee his heirs successors executors administrators and assigns, as the person, for the time being entitled to the mesne reversion, would have had, if no such merger had happened.]

† A rent must be a *profit*, but it may be either in money or money's worth, and either by payment, render, or corporeal service. But, being a compensation or equivalent, it must not be part of the thing itself, although it may be of its future produce: it must also be certain, or capable of being reduced to a certainty by either party. Rent (unlike interest which accrues *de die in diem*) becomes payable only on the accomplishment of the full period at which it is made payable. If, therefore, a tenant for life, or the owner of any other limited estate, grants a lease, reserving rent payable half-yearly, and dies in the interval between the rent days, at common law

2 Bl. Com. 41.

Co. Litt. 47, a.
Parker v.
Harris, 4 Mod.
79.

A rent, therefore, necessarily supposes a reception of such lands or tenements from another

Cro. Jac. 500.
Cro. Eliz. 380.
565. 4 *Leon.*
247.

Paget v. Gee,
Ambl. 198.
Vernon v.
Vernon, 2 *Bro.*
C. C. 659.
8 *Ves.* 308.

the lessee was bound to pay rent only up to the last rent day, and none from that time up to the determination of the lease. But now, by the statute 11 *G. 2, c. 19, s. 15*, the personal representatives of tenants for life are entitled to an action on the case for a proportionate part of the rent accruing in their ancestor's lifetime. This act has been extended by construction to the executors of tenants in tail dying without issue, in the case of leases being made by them, which are not binding on the remainderman or reversioner. And it is presumed, that the executors of a husband, seised in right of his wife, are also entitled within the act, in the case of a lease granted by him alone, so as not to operate under the enabling statutes; *et vide* 1 *Swanst.* 337, 454.

[The statute 4 & 5 *W. 4, c. 22*, was passed to obviate the doubts which have arisen upon the stat. 11 *G. 2*, as appears by the preamble of the former act. Section 1, enacts, That rents reserved on leases determining on the death of the person making them, (though not strictly tenant for life), or on the death of tenant *pur autre vie* shall be considered as within the provisions of the stat. 11 *G. 2*. The 2nd section enacts, That all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, and which leases shall have been granted after the passing of the act, and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in *England* and *Ireland*, payable or coming due at fixed periods under any instrument executed after the passing of the act (16 June, 1834), or, being a will or testamentary instrument, coming into operation after the passing of the act, shall be apportioned, so that on the death of any person interested in any such rents, annuities, &c., or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on

to whom they primarily belonged, and in whom the ultimate property continued vested : hence

the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, &c. being made. The statute then gives the same remedies at law, and in equity for the apportioned part as for the entire rent, &c. The 3rd section provides, That the act shall not invalidate any express provision against apportionment.

It has been decided that the above statute does not apply to *parol* leases. 4 *Myl. & Cr.* 484 : and that the second section applies only to cases in which the interest of the person entitled to the rents or other periodical payments is determined by the event on which the apportionment is to take place ; so that where a tenant in fee, grants a lease reserving rent, and dies before the expiration of the lease, the rent will not be apportionable between his real and personal representatives, under the above statute. *Brown v. Amyot*, 8 *Jurist*, 568].

Rent is due and payable upon the land from whence it issues if no particular place be mentioned in the reservation, and it is strictly demandable and payable before the time of sunset on the day whereon it is reserved, though perhaps not absolutely due till midnight ; and therefore if the lessor die before sunset on the day whereon rent is demandable, the rent unpaid goes to his heir, but if after sunset and before midnight, it is said that it shall go to his executor and not to his heir.

Co. Litt. 201.
202, a. note.
Co. Litt. 302.
1 *Anders.* 253.
1 *Saund.* 287.
Prec. Ch. 555.
Salk. 578.

1 *P. Wms.* 178.

The tenements out of which a rent is to issue must be of

Co. Litt. 142.
(a).

it follows, that, if lands or tenements were *not* derived from another, as anciently when lands were held in *allodio*, or if no other person has such ultimate property in him, there can be no rent.

If a person, consequently, grant over *his whole property* in certain premises to another, the other (or grantee) paying to such person and his heirs a certain sum annually for ever, such annual sum will *not be properly a rent*, as the grantor has no ultimate property or reversion in him.

a corporeal nature, in order that the person so entitled to the rent may have a remedy by distress. The rent must also be reserved to one of the grantors, and not to a stranger to the deed. To rents in gross, the remedy by distress originally appertained by express reservation only, and hence arose the distinctive appellations of charge and seck to rents of this description, as they were accompanied or not with such express remedy; but now, by the statute 4 G. 2, c. 28, all rents formerly rents-seck are alike attended by that remedy.

*Rodham v.
Barry, K. B.
April, 1826.*

[By the 42nd section of the stat. 3 & 4 W. 4, c. 27, no arrears of rent are recoverable for more than six years.]

[A rent must either be reserved on a reversion, or it must be a rent-seck, a rent-service, or a rent-charge; but as there cannot be a rent-seck, rent-service, or rent-charge issuing out of a term, if a termor assign his whole interest in his term, rendering rent, he cannot distrain if the rent be in arrear, as he has no reversion: his only remedy, therefore, is upon any covenant or contract existing between him and the assignee. *Bro. dette*, pl. 39. *Poultney v. Holmes*, *Stra.* 405. — v. *Cooper*, 2 *Wils.* 375. *Smith v. Mapleback*, 1 *T. R.* 441. *Preece v. Corrie*, 5 *Bing.* 24.]

Such annual payment is, indeed, commonly denominated a *rent-charge* or *rent-seck*; but it is not strictly and in reality a *rent*; and the law, accordingly respected it differently; as it gave the grantor no power of distress without a special stipulation.*

* This method of conferring property was probably first devised as a convenient means of providing for younger children, without interrupting the descent of the feud upon the eldest son; and also of carving out interests in land without the necessity of obtaining the consent of the lord, as was necessary in the case of a transfer of the land itself; for by this means no stranger was introduced into the feud, nor any relative obligation created between him and the lord. But as interests of this kind were an anomaly in the feudal system, they were viewed unfavourably, and distress was not allowed, unless it was expressly reserved: if, however, such a rent were granted for equality of exchange or partition, or in lieu of dower, it was not regarded in this obnoxious light, but was termed a *rent-charge* of common right, to which the remedy by distress was incident without any express provision. *Gilb. Rents*, 17. And it has lately been decided, that a distress may be taken for arrears of a *rent-charge* created by *will*, although the testator does not in terms give a power to distrain—that power being a consequence drawn by law from the *rent-charge*. *Rodham v. Berry*, *K. B.*, April, 1826.

[In the present day *rent-charges* are frequently created for securing *pin-money* and *jouretures* to married women, a present provision for an eldest son, for procuring the qualifications of a freeholder, and for securing life annuities as a mode of raising money:] between the last description and a mortgage there is this difference;—a mortgage constitutes a *debt*; a life annuity is an *absolute purchase*;—the consideration of the one is to be returned; the consideration of the

Again, if a person grant an annual sum to be issuing out of his lands to another and his heirs for ever, without parting with any property in the lands themselves, it will be no *rent*, as it is no *return*, no *compensation*, since the grantee has no lands in consequence of such grant for which to *render* or *return* a *compensation*.*

As, however, the sum stipulated to be paid is an annual, or at least a periodical sum, and to be issuing out of lands, it was, by reason of its analogy to the proper rent, denominated a *rent*-

other is gone for ever: and although a life annuity may be made repurchasable, the money paid for redemption is not paid in discharge of a lien on the estate, but as the consideration for a new purchase. The principle to be collected from the cases on this head is, that since the proviso for repurchase is solely for the advantage of the *grantor*, by allowing him to extinguish the annuity at pleasure, without enabling the grantee to *compel* redemption, the grant is to be considered as strictly legal, and in no way subject to the rules which govern equities of redemption. See *Lawley v. Hooper*, 3 *Atk.* 278. *Murray v. Harding*, 2 *W. Black.* 859. *Irnham v. Child*, 1 *Bro. Ch. Ca.* 92. *Corn. U.* 42. 1 *Pow. Mortg.* 139, *n.* 5th ed.

* If a rent-charge be reserved to the grantor on a conveyance in fee, the grantor is said to hold the rent by *re-grant* from the grantee. If so, the rent should be subject to the charges and incumbrances of the grantee; a point which has not yet received its due share of consideration.—As to the apportionment of rents, see the late case of *Smith, ex parte*, 1 *Swanst.* 337, and the learned reporter's note there, and the statute 4 & 5 *W.* 4, c. 22, *suprà*, p. 284, *note*.

charge, or a *rent-seck*, according as the power of distress was or was not given.

Again, as a proper rent is a compensation or return for the enjoyment of a particular estate, it follows that when the particular estate determines the rent must also cease.

As the returns of the feud were conditions, on the breach of which the feud reverted to the lord, so the nonpayment of rent occasioned a forfeiture of the lands out of which it was to issue.

The rigour of the feudal law with respect to forfeiture, in the cases of nonpayment of rent, was soon, however, abated. It was thought unreasonably severe to insist on an absolute forfeiture of the premises on nonpayment of rent at the very day on which it was reserved; and the law of distresses was, therefore, adopted from the civil code. But, as the distress was merely a substitute for the feudal forfeiture, it follows that it could only take place where *that* was allowed. If a person had no right of reverter, therefore, as in the cases where the lands, out of which the annual payment was to issue, had not moved from him, or where he had parted with his ultimate property in the lands, which had originally moved from him, there could be no forfeiture to him of the lands or tenements; and

consequently, he could not be entitled to a distress, which was merely substituted for the former remedy. If the particular estate for which the rent was to be rendered had expired, there could not, possibly, be a forfeiture; as the only estate, which could have been the subject of forfeiture, had ceased to exist; and, consequently, there could be no distress.

In the two former cases, indeed, a power of distress might have been expressly created, but then it was, as the terms import, a *privat estipulation* between the particular parties, and not a remedy given by the law. The law, however, has been altered in this respect, by statute 4 *Geo.* 2, c. 28, s. 5; and in the case of the expiration of the term by the statute 8 *Anne*, c. 14.

If the lessor be seised *in fee simple*, the proper rent should be reserved *to him*, “*his heirs and assigns* ;” if he have only a *chattel interest*, *to him*, “*his executors, administrators, and assigns*.” Though the best way of reserving such rent is to reserve it *generally*, without expressing to whom; as “*yielding and paying therefore, yearly, during the said term, the sum of, &c.*” as the law will give it to the person who shall be, from time to time, entitled to the immediate reversion, which the rent will always follow; for as the rent is only a compensation for the lands, it shall go to him who would have

8 Co. 71, a. 1.
Vent. 148. 161.
Gilb. Rents, 64,
&c.

been entitled to the lands in case the compensation failed.*

* If two joint-tenants lease lands by parol or deed poll, reserving rent to one of them, it shall nevertheless enure to both, [because the reversion remains in jointure.] If the lease be by indenture, the other will be estopped from taking a share; and if he to whom the rent is reserved die in the lifetime of his companion, the rent will cease, but the lease will continue; and if one joint-tenant make a lease for years, reserving rent, and die in the lifetime of his companion, the survivor shall not have the rent. [And the reason appears to be that no privity exists between the lessee and the remaining joint-tenant, who by survivorship holds the original reversion to which the rent reserved in the lease by his deceased companion is not incident; or, as Lord *Coke* observes, because the surviving joint-tenant claimeth in from the original grantor, which is paramount the rent. But if one of two joint-tenants of a *term* makes an underlease of his moiety to a stranger, reserving rent and dies in the lifetime of his companion, the survivor shall not have the rent, but it shall go to the personal representatives of the deceased joint-tenant; because the underlease worked a severance of the jointure, for a term of a small number of years is of as high an interest as a term for many more years.]

Co. Litt. 47.

Co. Litt. 192, a.

1 *Inst.* 135, a.
318, a.

Yelv. 189.

Dyer, 187, a.

Inst. 192, a.

2 *Cru. Dig.* 380,
4 ed.

Reservation of rent by two tenants in common will operate in severalty, not indeed to make two rents of the full amount, but each shall take his proportion.

If two coparceners make a lease, reserving a rent, they shall have the rent in common annexed to their reversionary estate in parcenary; but if afterwards they grant the reversion, excepting the rent, they shall from henceforth be joint-tenants of the rent. A rent in gross being collateral to lands cannot be divested; nor will the simple nonuser of the right to receive it, interfere with the continuance of the

Wingate's Max.
19, pl. 63.

Finch,
B. 1, p. 9, ed.
1678, 8vo.

Though the statute 4 *Geo. 2, c. 28, s. 5*, has given the same power of distress in cases of rents-seck as in those of rent-charge, it is still usual to insert a special power of distress in the grants of rent; and such special power is generally accompanied also with a clause of entry on non-payment, with power to enjoy till the arrears be satisfied.

2 *Sand. Uses*,
28, ed. 4. See
Cru. Dig.
vol. iii. 273.
292, vol. v. 164,
ed. 4.

Rents-charge or seck may be created by [feoffment or grant operating at common law or by] *bargain and sale, lease and release, covenant to stand seised, feoffment or grant*, [operating by the Statute of Uses; and before the abolition of fines and recoveries by the late statutes (3 & 4 *W. 4, c. 74*, and 4 & 5 *Ib. c. 92*), rents-charge or seck might be created by fine or recovery. They] may be limited to one in tail, with remainders over.

Bull. n. (2) to
Co. Litt. 298, a.

They may also be *released to the person seised of the lands*; or *conveyed to a stranger by grant*, and that even to commence *in futuro*, or *under the Statute of Uses*; as a person may be seised of a rent to an use, which use will be immediately

3 *Cru. Dig.*
294, ed. 4.

owner's presumptive possession. A fine or recovery levied or suffered of the land would not, therefore, affect the interests of persons in the rent; but although a rent-charge cannot be devested, non-payment of rent for any considerable period, will be a ground for presuming that it has been released.

executed by the statute.* So a *fine* or *recovery* might be of a rent.†

Fig. 97. Cru. Dig. vol. 5, 164. 374, ed. 4.

If a rent be limited to *A.* in tail, *with remainder over in fee, A.*, by suffering a recovery,

Fig. 97. Butl. n. (2) to Co. Litt. 298, a.

* If, therefore, lands are conveyed to *A.* and his heirs, to the use, intent, and purpose that *B.*, or that *B.* and his heirs, may receive a rent, the use is executed by the statute. So where lands are conveyed to *A.* and his heirs, to the use, intent, and purpose that *B.* and his heirs may receive a rent, with a declaration that *B.* and his heirs shall stand seised of the rent, to the use of *C.* for life, with remainders over, the rent is executed in *B.*, *C.* and the remaindermen taking mere trusts. If the estate be conveyed to *A.* and his heirs, to the use that *B.* may receive a rent for life, and after his death, to the use that his first and other sons, successively, and the heirs of their respective bodies, may receive the rent; it may be contended that these are distinct rents, and that the rent to the second son is too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections might also be taken to recoveries suffered by the father and son, on the ground that the tenant to the *præcipe* (being made by the father) had not an estate of freehold in that rent which was the subject of the son's entail. The way, therefore, to limit the rent, is, to grant a rent to a stranger and his heirs, in trust that he regrant it to the intended uses. *Co. Litt. 271, b. (1).*

† If the rent be created by deed, or even as it should seem by parol, it cannot be released without deed, either at law or in equity. If a rent-charge be granted by a tenant for life and the remainderman in fee, a release to either enures for the benefit of the other; but a release to one tenant in common does not operate for the benefit of his companion.

See Cupit v. Jackson, 1 M. Cleland, 495. 1 Inst. 267, b.

[3 P. Wms.
229.]

might bar his issue and the remainder over, and gain *a clear and absolute fee in it*: but if a rent were granted *de novo* to A. in tail, *without a remainder over*, and A. suffered a recovery, he would only acquire *a base fee determinable on failure of his issue*.*

* If there be several successive estates tail in a rent in remainder, the grantee in tail might, by suffering a recovery, acquire a fee commensurate with the duration of his own estate tail and the estates tail in remainder, that is to say, until all the individuals to take under them be extinct. And the reason of this difference between the effect of a recovery of a rent and a recovery of land is, that the rent being charged upon the land for a certain period only, the grantee cannot by any means extend the duration of the charge, so as to make it a rent in fee; although, by the exercise of rights incidental to particular interests, he may acquire the absolute dominion over it for the period originally granted.

PRINCIPLES
OF
CONVEYANCING,
&c. &c.

BOOK II.

OF CONVEYANCES, AS THEY RELATE TO ESTATES.

CHAP. I.

OF A FEOFFMENT.

A FEOFFMENT is a conveyance which operates by *transmutation of possession*: it is essential to its completion that the *seisin* be passed.* Hence

See 1 *Burr.* 92.
107, and *Cowp.*
694. 701, &c.
2 *Bl. Comm.*
310. *Touch.*
203. *Butl. n.*
(1) to *Co. Litt.*
271, b. 2 *Sand.*
Uses, 1.

* In *Rees dem. Chamberlain v. Lloyd, Wightw.* 123, a feoffment was tendered in evidence upon which no memorandum of livery of seisin was indorsed. The feoffment had been made for twenty-five years, and possession had gone along with it. On the one side it was contended that livery of seisin ought not to be presumed under *thirty* years, the

it can only be adopted in cases where the seisin may be, and is actually to be, conveyed; as in the transfer of estates of *freehold in possession*. [It is conceived that if a deed is intended to operate strictly as a feoffment, and not under the statute 7 & 8 Vict. c. 76, livery of seisin will be requisite, notwithstanding the second section of that act, it merely authorizes any person to convey real estate by a deed to have the effect of a lease and release, without the accompaniment of a lease for a year, livery of seisin or inrolment, *vide sup.* 249, and *infra*, ch. *Barg. & Sale*.] In the transfer of *chattel interests* there is no seisin to be conveyed, as the seisin remains in the freeholder: hence a term of years cannot be conveyed by feoffment. In the transfer of *reversions* or *remainders* on a freehold, the actual or corporal seisin is not concerned, as it continues in the

Of livery,
see *Watk.*
n. xxix. to
Gilb Ten.
[See 5 *Bar.* &
Adol. 575.]

period at which it becomes unnecessary to prove deeds, [9 *Ves.* 5. 2 *Bl. Com.* 368. *Gilb. Ev.* 94]; on the other side it was urged that livery ought to be presumed after the expiration of *twenty* years, as possession for that length of time would bar a possessory action. The Court of Exchequer thought twenty years the best analogy, but did not give any decided opinion on the point, as the necessity of livery was superseded by its being recited in the deed that the feoffee was in possession, which it was held estopped the feoffor from saying otherwise.

[But livery of seisin according to an indorsement thereof on the deed of feoffment will not be presumed within any period less than twenty years. *Doe v. Marq. of Cleveland*, 9 *Bar. & Cress.* 864. *Doe v. Davies*, 2 *Mee. & Wel.* 503.]

particular tenants: Hence they cannot pass by feoffment, but by *grant*. So of *equitable interests*, &c.

Hence, too, feoffments can only be made by a person *in the actual seisin** to a person who is *not in the actual seisin*; and, therefore, *one joint-tenant cannot enfeoff his companion*, because *his companion* has the seisin already; each joint-tenant being seised *per mie et per tout*. But, as *tenants in common*, and *coparceners* as to some purposes, have several freeholds, they *may enfeoff their companions of their respective shares*.

But [previously to the statute *8 & 9 Geo. 3. c. 36*, *7 & 8 Vict. c. 76*, *See 1 Burr. 92.* ~~s. 2,~~] a feoffment by a person having no right of property in the lands would pass them; because the moment he entered to give seisin he gained the fee simple in possession by wrong; [but now the feoffment has no tortious operation.]

This mode of conveyance was, in many instances, the most advisable, as it cleared all disseisins, &c. and turned all other estates into rights; so that a fine, levied by the feoffor to the feoffee, or by the feoffee to a stranger, [would before the operation of the statutes abolishing fines have barred] them, if not avoided within the time prescribed by the statute.†

[* See *Doe v. Taylor*, 5 B. & Adol. 575.]

† But to give a fine this effect, one of the parties must

The giving of livery, indeed, was often attended with inconvenience and expense when the feoffor resided at a distance from the lands ; but this might be easily prevented by executing a power of attorney ; and we may remember that [aggregate] corporations must always have made

have had the freehold. If a termor [previously to the above statutes] wished to acquire the fee he should have assigned the term to a trustee in trust for himself personally. Having then no legal interest in the land he might have entered and made a feoffment, on which a fine might have been levied, and the use thereof declared to himself in fee. The effect of the feoffment was to turn the estate and seisin of the trustee and reversioner into rights of entry ; but the reversioner might have entered within five years from the last proclamation on the fine to revest his seisin, and if he did so, the term in the trustee would have been revested also, and the trustee would then stand possessed of it in trust for the original termor, whose wrongful fee would then be destroyed : if the reversioner did not enter he would have been barred by nonclaim or the fine if he were not under disability, and the *quondam* termor would have acquired an indefeasible estate in fee, and he might then take an assignment of the term to attend the inheritance. If the first assignment of the term alluded to the intended feoffment the assignee would be a party to the disseisin, and the term would, it is apprehended, be forfeited, and the reversion accelerated into an estate in possession. This subject has occupied the attention of the Courts, and the above is submitted to be the result of the decisions ; which are the following :—*Taylor v. Horde*, 1 Burr. 60. 2 Cowp. 689. *Jerrit v. Weare*, 3 Price, 575. 3 Pres. Abs. Pref. ix. *Doe v. Moody*, 1 Sand. U. 40. [*Sugd. V. & P.* 261. note, ed. 6.] 2 Pres. Conv. Pref. xxxii. *Doe v. Lynes*, 3 Barn. & Cress. 388. *Reynolds v. Jones*, 2 Sim. & Stu. 206.

attorneys, under their common seal, to deliver [and receive] seisin.

A feoffment, therefore, is incompatible with the co-existence of any conveyance operating by way of use.* Thus a feoffment and bargain and sale

* The difference between conveyances at common law and conveyances which derive their effect from the Statute of Uses is thus stated by *Mr. Butler* :—A feoffment, fine, and recovery, are conveyances at the common law, so far as they convey the land to the feoffee, conusee, or recoveror ; if they are directed to operate to, or to the use of the feoffee, conusee, or recoveror, they have no other operation than as conveyances at the common law : but if they are directed to operate to the use of any *other* person, then, though they are conveyances at common law so far as they convey the land to the feoffee, conusee, or recoveror, they derive their effect under the Statute of Uses, so far as the use is limited by them to the person or persons in whose favour it is declared. A lease and release has a mixed operation ; the lease has the operation of a bargain and sale, and is in effect a bargain and sale, under the statute ; but the fee passes to the lessee, and enlarges his estate to an estate of inheritance by the operation of the release at the common law ; and, if the release is directed to operate to, or to the use of the releasee, he is said to be in by the common law ; but if the use be declared in favour of *another* person, the statute then again intervenes, and executes the use in the person or persons in whose favour it is declared. A bargain and sale inrolled, and a covenant to stand seised, wholly derive their effect from the Statute of Uses ; the first is considered a real contract, by which the bargainor, for a pecuniary consideration, sells and contracts to convey the lands to the bargainee : the second is a real covenant, by which a person covenants to stand seised to the

cannot be made *by* the same person, of the same lands, at the same time; for the feoffment conveys the seisin or possession to the feoffee, while it is absolutely essential to the efficacy of a bargain and sale that it remain in the bargainer. Now the possession cannot be in, and not in, the feoffor at the same time. If the feoffment take effect, the possession *must be out of him* by the very act of livery; and if the possession *be out of him*, he cannot be seised to the use of the bargainee. A bargain and sale is a contract to convey, and not an absolute conveyance, as a feoffment. A person cannot contract to sell, what he has actually parted with. If he convey the possession to another he can have none in himself to supply the use.

2 *Bl. Comm.*
300. *Gilb. Ten.*
133, and *Watk.*
n. liv.

A clause of *warranty* [which is now abolished by statutes 3 & 4 *W. 4*, c. 74, s. 14, 4 & 5 *Ib.* c. 92, s. 11, and 3 & 4 *Ib.* c. 27, s. 39, was before

use of his or her husband, wife, child, or near relation.—Neither of those conveyances has any effect at the common law, or independently of the Statute of Uses, in conveying the land from the party selling or covenanting to stand seised, to those in whose favour they are intended to operate; so that at common law they have no legal operation, and are merely declarations of trust, binding the land in equity. But the statute attaches on them, and divests the land from the party selling or covenanting to stand seised, and vests it in the person to whom it is limited. *Butl. Fearne*, 416, 7th edit.

[In illustration of the preceding note, see the two tables *supra*, pp. 266, 267.]

those statutes usually] added to a feoffment; but it was preferable to insert a covenant by the feoffor, “for himself, his heirs, executors, and administrators,” as the warranty only bound the *heirs*. Yet it was deemed sometimes prudent to insert a clause of warranty in addition to the covenant, as it might possibly bind a reversioner or remainderman when no assets descended, and *Ante*, b. 1, c. 8. be even a bar to a latent entail.

CHAP. II.

OF A GRANT.*

2 *Bl. Com.* 317.
Touchst. 228.
Butl. n. (1) to
Co. Litt. 384, a.
 2 *Sand. Uses*,
 25.

A GRANT is appropriated to the conveyance of things *not in possession*, as reversions and remainders, and other incorporeal hereditaments, as rents, advowsons, &c. of which no livery can, of course, be given.† Hence the law divided

[* A grant is another of those conveyances which are said to operate by transmutation of possession or seisin; of course it does not pass the *actual possession*, a reversion or remainder and other incorporeal hereditaments being the subject of its operation; but as remainders, reversions, and other incorporeal hereditaments, may be conveyed to uses, the grant (strictly operating as such) passes a (statutory) seisin to the grantee, to serve or supply the uses to the *cestui que use*. Where no uses are limited upon the seisin of the grantee, he takes at common law, and the statute is not brought into operation. *Vide infra*, ch. *Lease and Release*, notes (a) and (d).]

† But the common practice is, to make all conveyances of freehold property by lease and release. If, however, the existence of a reversion can be clearly proved, the expense of the lease for a year may be saved. It is curious to observe a doctrine so well settled giving way to an inconsistent practice.

estates into those which lay in *livery* and those in *grant*.

As livery of seisin was a matter of notoriety, it was essential to the transfer of whatever that livery could be made. It was, indeed, of itself, sufficient to effectuate such transfer; and no farther evidence of the conveyance was required than the evidence of such livery. But, as livery could not be made of incorporeal hereditaments, interests, or rights, the law, even before the Statute of Frauds, required the transfer of them to be in writing under seal. In many cases, *Gilb. Ten.* 81. also, it ordained that *attornment* should be made; as in the conveyance of a reversion or a seignior; and that for the following reasons:—

1st, That the tenant in possession might not be subjected to a stranger, or a new lord, without his own approbation and consent.

2ndly, That he might know to whom he was to render his services and distinguish the lawful distress from the tortious taking of his cattle.

3rdly, That by such attornment the grantee of the reversion or seignory might be put into the possession of it, and that others might be apprized and informed of the transfer.

Stat. 4 Anne,
c. 16, s. 9, 10,
and 11 Geo. 2,
c. 19, s. 11.

The reasons, however, for attornment having in a great measure ceased, from the change of manners, and the decline of feudal principles, attornment is now rendered unnecessary to the completion of a grant.*

* The reason, however, for attornment, so far as it proceeded on notice to the tenant, is still applicable to the case of a mortgage, where the mortgage is made *subsequently* to the lease; for a mortgagee will not be entitled to the rent under a lease made *prior* to the mortgage, until he shall have given notice of the mortgage to the tenant, and required payment of the rent to himself. Otherwise than this, actual attornment is seldom heard of in practice, except to a receiver, or in the case of a recovery in ejectment, where the tenants frequently attorn to the lessor of a plaintiff, in order to save the expenses of sheriffs' poundage and officers' fees on executing a writ of possession. 2 *Bing.* 59.

A feoffment by a tenant in tail, who was actually seised in possession by force of the entail, [before the statute 3 & 4 *W.* 4, *c.* 74, *s.* 14, and 4 & 5 *Ib.* *c.* 92, *s.* 11,] created a discontinuance of the estate tail, by transferring to the feoffee not only the possession, but also the right of possession, so as to take away the entry of the issue in tail, as also of the persons in remainder and reversion, and to drive them to their real action. But a grant could not in any case create a discontinuance, for every discontinuance worked a wrong; whereas a grant only transfers what the grantor may lawfully give. Thus *Lord Coke* says, if tenant in tail of a rent service, or of a remainder or reversion in tail, *grants* the same in fee, and dies; this is no discontinuance to the issue in tail. 1 *Inst.* 332, a. It followed from this principle that a grant could in no instance create a forfeiture, for it was an innocent assurance, and conveyed no more than the grantor might lawfully pass. "If a tenant for life, or years, of an advowson,

The operative word in this species of conveyance is "grant."*

rent, common, or of a remainder or reversion of land, grants the same in fee, this is no forfeiture, because nothing passes but that which lawfully may pass." 1 *Inst.* 251, b.

[But by the above mentioned statutes, and the 3 & 4 *W.* 4, c. 27, s. 39, discontinuances are abolished; and now no conveyance can operate by wrong. 7 & 8 *Vict.* c. 76, s. 7.]

* For the construction of a grant see the last note in the chapter on *Covenants* to stand seised.

CHAP. III.

OF A GIFT.

2 *Bl. Com.* 316.
Touchst. 227.

A GIFT is properly, a *voluntary conveyance*; that is, a conveyance *not founded on the consideration of money or blood*.

See 13 *Vin.*
 519. *Fraud.*
 22 *Vin.* 15.
Voluntary
Conveyance.

The operative word in it is "*given*." It is, at this day, a suspicious species of conveyance, as being without what the law denominates either a good or valuable consideration. It is void as to those who were creditors of the donor at the time of its being made, though valid as to subsequent creditors. If it were of an estate of freehold in possession, it required livery to perfect it; for, as it had no consideration either of blood or money, no use arose on it; [but now it is conceived it may be effected by a deed operating under the 7 & 8 *Vict. c.* 76, s. 2, as, before that statute, it might have been by feoffment with livery.*]

* A conveyance in consideration of 5s. or 10s. is deemed a voluntary conveyance, for want of adequate consideration; and in such a conveyance a use may be raised. Without a deed of conveyance no estate in freehold property can pass;

Originally, feoffments were considered as gifts. 2 Bl. Com. 310.
 The term Gift now, however, is generally ap- Wright's Ten. 150.

receipt of rent or acquisition of the possession is not enough. To the transfer of personal [chattels], however, a deed of conveyance is not necessary, as whether there be or be not a written assignment, there must be actual delivery of the thing to the assignee. A parol gift without delivery is void. *Smith v. Smith*, 2 *Stra.* 955.

A voluntary conveyance, or a conveyance founded on a nominal consideration, is void, as against a subsequent purchaser of the estate from the settlor for valuable consideration, whether such purchaser have notice of the previous voluntary conveyance or not. *Cowp.* 278. 2 *Lev.* 105. 9 *East*, 59. 2 *Taunt.* 69, 77. 18 *Ves.* 100. *Currie v. Nind*, 1 *Myl. & Cr.* 17. [*Willats v. Busby*, 5 *Beav.* 193. *Doe v. Ball*, 11 *M. & Wel.* 531. *Cotterell v. Homer*, 7 *Jurist*, 544.] But a person who has made a voluntary settlement cannot, it should seem, maintain a bill in equity for specific performance of an agreement which is to defeat that settlement; the party *himself* has no right to disturb it; as against *himself* it is valid and binding; when he seeks to get rid of it, the Court will not impede him, but it will not assist him. *Smith v. Garland*, 2 *Meriv.* 123. A voluntary conveyance of real estate, or a chattel interest, in favour of a child, by one not indebted at the time, though he afterwards becomes indebted, will be good against future creditors, though not against future purchasers, (*Russel v. Hammond*, 1 *Atk.* 15, 16. *Holloway v. Millard*, 1 *Madd. Rep.* 414. *Battersbee v. Farrington*, 1 *Swanst.* 106,)—provided there be no particular evidence or badge of fraud, a power of revocation for instance, (*Peacock v. Monk*, 1 *Ves.* 132,)—or retention of possession (*Bates v. Graves*, 2 *Ves. jun.* 293); and see *Stileman v. Ashdown*, 2 *Atk.* 481, and *Lord Banbury's case*, 2 *Freem.* 8.

As to marriage settlements: if a settlement be made after

propriated to the creation of an *estate tail*; hence the person creating an estate tail is denominated

marriage, it will, as a general rule, be fraudulent and void against all persons who are creditors of the husband at the time of the settlement, *Middlecombe v. Marlow*, 2 *Atk.* 520. *White v. Sansom*, 3 *Ibid.* 412. *Watts v. Thomas*, 2 *P. Wms.* 364; and *Kidney v. Coussmaker*, 12 *Ves.* 155,)—unless such settlement contain a provision for debts (*George v. Milbank*, 9 *Ves.* 190); or is made in pursuance of articles before marriage (*Beaumont v. Thorpe*, 1 *Ves.* 27); or unless it be against a single debt (*Lush v. Wilkinson*, 5 *Ves.* 387); or the debt be secured by mortgage, in which case it would not affect the settlement (*Stephens v. Olive*, 2 *Bro. C. C.* 90); for to do that it seems the party must have been insolvent at the time. (*Lush v. Wilkinson*, *ubi supra*; and see *East India Company v. Clavell*, *Gilb. Eq. Ca.* 37.) [In the recent case of *Shears v. Rogers*, 3 *Bar. & Adol.* 362, a person being indebted by bond in 102*l.* assigned a lease, (value 106*l.*) to a trustee for the benefit of himself for life, and after his death for one of his daughters in law; and shortly afterwards died. By this assignment the residue of his property became insufficient to discharge the bond debt. The Court of King's Bench held, that the assignment was within the statute 13 *Eliz. c. 5*, and void against creditors. The Court gave a strong intimation of opinion, that to make a conveyance fraudulent within the above statute, the party, at the time of making it, must be indebted to the extent of insolvency, and that the party may render himself insolvent, by the execution of the conveyance. See also *Wittington v. Jennings*, 6 *Sim.* 493.] But it is observable, that if (with the exceptions alluded to) there are creditors at the time of the settlement, and the settlement is on that account declared fraudulent, the property so settled will become part of the husband's assets, and all *subsequent* creditors will be let in to partake of it. *Taylor v. Jones*, 2 *Atk.* 600.)

the *donor*, and the person taking it the *donee*; hence the issue of a tenant in tail is said to take

[In reference to the question how far the consideration of marriage may extend to sustain limitations to collateral relatives, see the cases collected in 4 *Cru. Dig.* 442, *et seq.* 4th ed.]

By the 73rd sect. of the late Bankrupt Act, (6 *G.* 4, c. 16,) [1 & 2 *W.* 4, c. 56.
2 & 3 *Ib.* c. 114.
3 & 4 *Ib.* c. 47.
5 & 6 *Ib.* c. 29.
2 & 3 *Vict.* c. 11.
5 & 6 *Vict.*
c. 122.] voluntary conveyances by any bankrupt, being insolvent at the time, are declared absolutely void, [and which does not appear to have been repealed by any of the subsequent acts.]

A voluntary deed never parted with, and executed for a purpose that has never been completed, is considered in equity as an imperfect instrument (*Cecil v. Butcher*, 2 *Jac. & Walk.* 573); and if a power of revocation be introduced in a deed which purports to be a voluntary settlement, it will then, it is conceived, become a testamentary writing, if the settlor, taking an estate for life under the settlement, retains possession of the deed (3 *Price*, 368, 379): and, therefore, if the estate be directed to be sold after the testator's death, and the money divided between certain persons, they will be considered as legatees, and must pay the legacy duty. In *Attorney General v. Jones*, 3 *Price*, 368, the settlor made a voluntary assignment of leasehold and personal property to trustees, for the use of himself for life, and of several persons therein named at his death, with a power of revocation reserved to himself; he never parted with the deed, nor with any part of the property during his life, and confirmed it, in most respects, by his will; the deed and will were considered to be in the nature of testamentary instruments, and the property passing under them was held to be subject to the legacy duty. 3 *Price*, 368. [See also *Gaskell v. Gaskell*, 2 *Yo. & Jer.* 502.]

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debt expressed in the

per formam doni, and the writ formerly given him to recover his estate was called the *forme-*

deed is good as against the grantor and his heirs ; but void as against a purchaser. *Leech v. Leech*, 1 *Cas. in Ch.* 249. But to enable a purchaser to set aside a deed made for payment of debts, he must, it is conceived, be a purchaser for valuable consideration, and have no notice of the deed of trust. See *Langton v. Tracy*, 2 *Ch. Rep.* 16. *S. C. Nels.* 126. [A conveyance of all the debtor's property, in trust for all his creditors generally, is an act of bankruptcy, unless protected by the 4th section of the statute 6 *G.* 4, *c.* 16. 7 *Sim.* 121. 1 *Mee. & W.* 714. So also, *a fortiori*, is a conveyance of all his property in trust for a part of his creditors ; for that upon the face of the instrument would be a fraudulent preference. A conveyance of part of a debtor's property for the benefit of all his creditors, does not seem to constitute an act of bankruptcy, 5 *T. R.* 424 ; unless it can be brought within the 3rd section of the above statute ; but a conveyance of part of his property in trust for a part of his creditors, does not necessarily carry with it any intrinsic evidence of fraud, unless when it is done in contemplation of bankruptcy, or with intent to give a fraudulent preference ; for then, as it would be contrary to the policy of the Bankrupt Law, it is an act of bankruptcy. *Dougl.* 88. *Round v. Byde*, *Cooke's Bank. Law*, 110. 7 *Bar. & Cr.* 529, in reference to insolvency, see the stat. 7 & 8 *Vict. c.* 96, *s.* 19.

A conveyance by a debtor to trustees for payment of scheduled creditors, who do not execute the deed, or conform to its forms, cannot be enforced by the creditors : *Garrard v. Lord Lauderdale*, 3 *Sim.* 1. 2 *Russ. & Myl.* 451 ; and see *Walwyn v. Coutts*, 3 *Sim.* 14 ; *S. C.*, 3 *Mer.* 707, and is recoverable by the debtor, *Acton v. Woodgate*, 2 *Myl. & K.* 492. *Ravenshaw v. Hollier*, 7 *Sim.* 3.

But although a deed of composition, not signed by the creditors within the time stated, is void at *law*, yet if the

don, [which is now abolished by statute 3 & 4 W. 4, c. 27, s. 36.]

creditors, who have not signed, act under it, it is good in equity. *Spottiswoode v. Stockdale*, *Coop.* 102; and see 3 *Bar. & Cr.* 242, as to such deeds being void at law.

Facilities are now offered under the statute 7 & 8 *Vict. c.* 70, for arrangements between debtors and creditors under the sanction of the Court of Bankruptcy.

A conveyance, by a bankrupt *bonâ fide* to a purchaser without notice, made and executed before the date and issuing of the *fiat* shall be valid, notwithstanding any prior act of bankruptcy. 2 & 3 *Vict. c.* 11, s. 12. And even where he had notice, if a commission against the bankrupt be not sued out within twelve calendar months. *Ib.* s. 13; see also *Ib. c.* 29, s. 1, as to contracts with the bankrupt: and now by sect. 7 of 5 & 6 *Vict. c.* 122, no person is liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any *fiat*. For corresponding provisions for *Ireland*, see 7 & 8 *Vict. c.* 90, ss. 36, 37.]

CHAP. IV.

OF A LEASE.

2 *Bl. Comm.*
317. *Touchst.*
ch. 15. *Bacon*
on Leases, and
ante, b. 1, c. 2.
[*Cru. Dig.* IV.
c. 5.]

A LEASE is the grant of the possession of lands or other things, to a person for *life*, *years*, or *at will*.

On a lease for life as it goes to the seisin as well as to the possession, livery must be made as on a feoffment; unless it be created by way of use. A lease for *life*, therefore, is a *freehold* interest, and must be passed by livery, &c. as any other estate of freehold. But a lease for *years* passing only the right of *possession*, as contradistinguished from the *seisin*, is completed by *the entry of the lessee*; for even *before* the entry, an *interest* passes to him (called his *interesse termini*) which the lessor cannot rescind. *Before entry*, however, the lessee cannot bring an action of trespass; nor is he, till entry, if he take at common law, and not by way of use, capable of receiving a *release of the reversion*. (a)

Litt. s. 459.
Co. Litt. 270.
[*Miller v.*
Green, 8 *Bing.*
92.]

(a) If he take by way of use, actual entry is not requisite; the *cestui que use* for years has a complete *estate* as distinguished from an *interesse termini*, immediately on the

[Previously to the statute 7 & 8 Vict. c. 76,] *8 & 9 Vict. c. 106.*
 a lease for a chattel interest was good by parol,
 so it exceeded not three years from the making,

execution of the conveyance, as is exemplified in the common assurance by lease and release; the lease for a year by way of bargain and sale raises a use, which is immediately executed into an estate in possession by the statute; if this were not the case, entry would be necessary on a lease and release, which would be as inconvenient as livery of seisin on a feoffment.

In 1788, a lease for twenty-one years was granted to *J. W.* which would expire at *Michaelmas*, 1809. In 1799, *T. W.*, the lessor, granted another lease to *J. W.* of the same premises, for a term of sixty years, to commence at *Michaelmas*, in 1809; in the year 1800, *T. W.* died, having devised the same premises to *J. W.* for life; in 1806, *J. W.*, by lease and release, conveyed away the legal estate of his life interest in the premises to a trustee in trust for himself. *J. W.*, therefore, had the legal estate for his own life from the testator's death in 1800, until 1806, when the legal estate was conveyed to his trustee; and it became a question, whether the term of sixty years was merged in the life estate,—in other words, whether the term to commence *in futuro*, in 1809, merged in the existing life estate. It was holden in the Court of K. B., that the reversionary term was not merged; for that being only an *interesse termini*, it did not acquire the character of an *estate* till after *J. W.* had conveyed away the legal interest for life: the two estates were not in him at the same time; there was therefore no merger of the *interesse termini*; but there was a merger of his lease for twenty-one years in the life estate; the Court observing that *J. W.* had nothing but his life estate until *Michaelmas*, 1809, and nothing but the term of sixty years after that period. *Vide supra*, 182. *Doe v. Walker*, 5 Barn. & Cress. 111.

29 *Car.* 2, c. 3.

[and whereon two-thirds at least of the full annual value is reserved ;] but, if it were for a longer term, or for an estate of freehold, it must have been by deed or note in writing, signed according to the Statute of Frauds ;* [now by the 4th section of the above statute of 7 & 8 *Vict.* c. 76, a lease must be by deed.]

See *ante*, b. 1, c. 22. (of Rents.)

A lease is usually and properly in consideration of a yearly rent ; and the best way of reserving such rent is to reserve it generally, as “ yielding and paying, therefore, yearly, during the said term, the sum,” &c. as the rent shall follow the reversion.

See 1 *Burr.* 125. 2 *Stra.* 1221. *Lekeux v. Nash.*

A *covenant* should be inserted for payment of the rent ; as the lease, if once assigned, might be assigned to a succession of beggars.†

* This position is more correctly stated *ante*, p. 43. If it were attempted to make a lease by parol for more than three years, and the lessee entered and paid rent, although the lease was void even for the three years, yet the lessee would be tenant from year to year ; *ante*, p. 5.

† This leads to the distinction between privity of estate and privity of contract. Immediately on the execution of the lease, a privity arises between the lessor and lessee, which (provided there are any collateral covenants in the lease not implied by law) is called a *privity of contract*, and on that privity, the lessee is bound to perform all those collateral covenants, although he should never perfect the lease by entry. When he enters, there arises between him and the lessor a second privity, called the *privity of estate*, and this renders him liable for the covenants implied by law. In all

There should be also inserted *a provision* ^{1 Burr. 125.}
for re-entry, on non-payment of rent, to guard

leases there are certain *implied* covenants. On the part of the *lessor* is implied a covenant, that his lessee shall quietly enjoy the lands demised during the term, against all persons lawfully claiming title: if the lease be for life, against all men; if only for years, against all persons having title, either paramount to, or through the lessor. [This implied covenant ceases with the interest of the lessor. *Adams v. Gibney*, 6 Bing. 656.] But against the acts of strangers, the law raises no undertaking upon a lease for years; and therefore, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrong-doer. *Com. L. & T.* 158. On the part of the *tenant*, the law implies a covenant to pay the rent—to cultivate the lands in a husbandlike manner—and to keep the premises in repair. These covenants are obligatory upon the lessee, so long as he continues to hold the premises without obstruction on the part of the lessor, or such persons as the lessor may have covenanted against. 1 *Roll. Abr.* 519. *Webb v. Russell*, 3 *T. R.* 402. *Iggulden v. May*, 9 *Ves.* 330. Besides these implied covenants, the parties usually enter into certain express covenants, the object of which is either to enlarge or abridge the implied covenants, or to provide for the performance or omission of some act connected with the thing demised, not provided for by law. Thus, the lessor's covenant for quiet enjoyment is usually qualified to a quiet enjoyment as against himself and all persons claiming under him; and the lessee's covenant to pay rent is often narrowed to a payment of rent while the premises are inhabitable, and his covenant to repair exempted from reparation rendered necessary by fire, wind, and tempest. Hence the division of covenants into such as are *express* and such as are *implied*. The introduction of an express covenant narrowing or enlarging an implied one, is in a great measure an abrogation of the implied covenant,

Line v. Stephenson, 4
Bing. N. S.
 678. 5 *Ib.*
 183.

Nokes's case,
 4 *Rep.* 80, b.

against the event of the lands being uncultivated or without sufficient distress; for though the

and the express covenant then becomes the only one on which the parties can sue.

All *implied* covenants run with the land, and so do many *express* ones; but the distinction between express covenants which run with the land, and such as do not run with the land, but are *collateral thereto*, and affect only the person of the lessee, is very abstruse. An expression of the rule was attempted in *Spencer's case*, (5 Co. 16, a,) with indifferent success. But whatever may be the exact criterion between collateral covenants and covenants running with the land, it has been decided, that a covenant for quiet enjoyment (*Noke v. Awdler*, Cro. Eliz. 436. S. C. Moore, 419. 8 Taunt. 715. *Campbell v. Lewis*, 3 B. & Al. 392); for further assurance (*Middlemore v. Goodale*, Cro. Car. 503); for renewal (*Spencer's case*, *ubi supra*, *Roe dem. Bamford v. Hayley*, 12 East, 464); to repair the demised premises (*Doe dem. Dean and Chapter of Windsor's case*, 5 Rep. 24. S. C. *Hyde v. Dean of Windsor*, Cro. Eliz. 552. *Marg. Barnard v. Godscall*, Cro. Jac. 309. *Conan v. Kemise*, Sir W. Jones, 245. S. C. *Congham v. King*, Cro. Car. 221. *Tilney v. Norris*, Lord Raym. 553. *Potter v. Swetnam*, Style, 406, and *Smith v. Arnold*, 3 Salk. 4); to pay rent (*Parker v. Webb*, 3 Salk. 5); to discharge the lessor of charges ordinary and extraordinary (*Dean and Chapter of Windsor's case*, 5 Rep. 25); to permit the lessor to have free passage to two rooms excepted in the demise (*Cole's case*, 1 Salk. 196. S. C. *Bush v. Calis*, 1 Show. 388. 12 Mod. 24. *Carth.* 232); to cultivate the lands in a particular manner (*Cockson v. Cock*, Cro. Jac. 125); to reside upon the premises (*Mayor of Congleton v. Pattison*, 10 East, 136); not to carry on particular trades (*Tatem v. Chaplin*, 2 H. Bla. 133); have all been held to be covenants running with the land; and it is a settled rule, that covenants running with the land, bind

statute of the 2 *Geo. 2, c. 19, s. 16*, gives a remedy in the latter case, yet it would be ad-

not only the covenantor during his lifetime (and his representatives after his death in respect of his assets) by *privity of contract*, but also every person who takes the legal estate for the residue of the term by *assignment*, such person being affected by *privity of estate*.

[To constitute a real covenant privity of estate between the covenanting parties is essential. So that if the owner of a messuage and land covenants with the owner of a neighbouring lime work and rail road, that he, his executors, administrators, and assigns, will always use that lime work and rail road, for making iron at and carrying it away from such messuage, it is not a covenant which runs with the land: it is between strangers, who do not stand towards each other in the relation of lessor and lessee; and the assigns will not be bound thereby. *Keppel v. Bailey*, 2 *Myl. & K.* 517. We may here observe, that a covenant to produce deeds runs with the land, the rule being, that it runs with the land for the benefit of the purchasers necessarily, but not for the benefit of the vendor. *Barclay v. Raine*, 1 *Sim. & Stu.* 449; and it would seem that Mr. *Fearne's* doctrine is now law, (namely) that a purchaser is entitled to require a covenant from the vendor not only for the production of the deed containing the covenant to produce the title deeds, but also a covenant for the production of the deeds themselves, to the same extent as the covenant in the vendor's possession entitles him to their production. *Cooper v. Emery*, 10 *Sim.* 609.]

As between the *lessor and lessee*, they are reciprocally bound to each other for the covenants *in law* by privity of estate, and for the covenants *in deed* by privity of contract. The *privity of estate* exists no longer than the relation of landlord and tenant; and therefore, if the lessee parts with his estate to a stranger with the concurrence of his lessor, the privity of estate is destroyed, and his liability thereupon

visible to empower the lessor to enter without being obliged to pursue the directions of that act.

ceases. *Walker's case*, 3 *Rep.* 24, b. *March v. Brace*, 2 *Bulstr.* 151. *S. C. Cro. Jac.* 334. *Brett v. Cumberland*, *Cro. Jac.* 523. *Thursby v. Plant*, 1 *Sand.* 240, n. (5.) *Ashurst v. Mingay*, 2 *Show.* 134. But it is not competent to him to put an end to the privity of estate without his landlord's assent; and therefore, in order to discharge the lessee, it is necessary that the lessor should testify his assent to the assignment, either expressly or impliedly, as by receiving rent from the assignee, or recognising the assignee as his tenant by some other act. *Wadham v. Marlowe*, 8 *East*, 316, n. *Auriol v. Mills*, 4 *T. R.* 98.

It is otherwise in respect of the lessee's liability upon the privity of *contract*. For when he has entered into an express agreement, he is so completely bound thereby that no assignment either of part or of the whole estate can exonerate him, even though the lessor assent to an assignment and receive rent from the assignee. *Rushden's case*, *Dyer*, 4, b. *Broom v. Hore*, *Cro. Eliz.* 633. *Matures v. Westwood*, *ib.* 617. *Ards v. Watkin*, *ib.* 637. *Barnard v. Godscall*, *Cro. Jac.* 309. *Brett v. Cumberland*, *ib.* 522. *Bachelour v. Gage*, *Cro. Car.* 188. *Norton v. Acklane*, *ib.* 580. *Ashurst v. Mingay*, 2 *Show.* 134. *Parker v. Webb*, 3 *Salk.* 5. *Wadham v. Marlowe*, 8 *East*, 314, n. *Buckland v. Hall*, 8 *Ves.* 95. *Staines v. Morris*, 1 *Ves. & Bea.* 11. As the lessee's assignment by *his own act* will not release him from his express covenants, so neither will an assignment by act of law. *Hornby v. Houlditch*, *Andr.* 40. *S. C.* cited 1 *T. R.* 92. So, if the lease be taken from him under an execution, he still remains liable upon his express covenants. *Auriol v. Mills*, 4 *T. R.* 99. And an insolvent debtor is liable upon his express covenants for a breach subsequent to his discharge, provided no particular release be given by the act. *Cotterel*

A lease may be *assigned* ; that is, the *whole interest of the lessee* may be conveyed to another ;

2 Bl. Comm.
326, 327.
Douglt. 187,
n. (*) 59.
Palmer v. Ed-
wards.

v. *Hooke*, Douglt. 97. *Aylet v. James*, cited 1 H. Bl. 441. As to bankruptcy, it is now settled by the late Bankrupt Act, that if the assignees accept the lease or agreement, the bankrupt shall *not* be liable to pay any rent accruing since the date of the commission, or to be sued in respect of any of the conditions, covenants, or agreements therein ; nor, if they decline, shall he be liable, if he deliver the lease up to the lessor, or person agreeing to grant it, within fourteen days after notice that the assignees will not take it ; and if the assignees do not (upon being thereto required) elect whether they will or will not accept the lease, the lessor or person so agreeing, or any one entitled under him, may petition the Lord Chancellor to compel them. 6 Geo. 4, c. 16, s. 75. See also *Copeland v. Stephens*, 1 B. & Al. 593 : [a similar protection is given to an insolvent under the 1 & 2 Vict. c. 110, s. 50. See also 7 & 8 Vict. c. 96, s. 12].

As between the *lessor* and *assignee*, the lessor, immediately upon the assignment, acquires a right against the assignee by reason of the privity of estate, and may enforce against him all the covenants in law and in deed which run with the land ; *Webb v. Russell*, 3 T. R. 393 ; provided the assignee accepts or assents to the assignment : and the law will presume that he assents to the deed, unless he does some act to shew his dissent ; but it is not necessary that such dissent be by deed or record, *any writing* will suffice for the purpose. 3 B. & Al. 39. If the assignee will not take the lease, the original lessee remains liable ; if the assignee accepts the lease, the lessor may, at one and the same time, sue the lessee upon his express covenant, and the assignee in respect of the privity of estate ; but then he will be permitted to take out execution against one only. *Brett v. Cumberland*, Cro. Jac. 523. The assignee being liable upon the covenants merely in respect of the privity of estate, and no privity of contract existing

1 *Str.* 405.
Poultney v.
Holmes, Dr. &
Stud. Dial. 1,
c. 8. 2 *Stra.*
 1221. *Lekeux*
v. Nash.

or the lessee may *underlet*, that is, convey for a *less term* than he himself has in the lands. If,

between him and the original lessor, it follows that his liability can last only so long as he remains possessed of the estate. As soon as he assigns *the whole* of it over, the privity is destroyed, and his liability ended, though the assignment be made without notice to the lessor. *Pitcher v. Tovey*, 1 *Show.* 340, *S. C.* 4 *Mod.* 71. 1 *Salk.* 81. 2 *Vent.* 234. 3 *Lev.* 295. *Carth.* 177. *Holt*, 78. 12 *Mod.* 23. *Boulton v. Canon*, 1 *Freem.* 336. *City of London v. Richmond*, 2 *Vern.* 421. *Buckland v. Hall*, 8 *Ves.* 95. *Staines v. Morris*, 1 *Ves. & Bea.* 11. Nor will an assignment to a mere pauper be deemed fraudulent;—the lessor still retaining his right of action against the original lessee upon the privity of contract. *Valliant v. Dodemede*, 2 *Atk.* 546. *Huddle v. Hawksley*, cited in *Lekeux v. Nash*, 2 *Stra.* 1221. *Taylor v. Shum*, 1 *Bos. & Pul.* 21. So an assignment to a *feme covert* will discharge the assignee. *Barnfather v. Jordan*, *Dougl.* 452. “For a *feme covert* is of a capacity to purchase of others without the consent of her husband, and though he may disagree and divest the estate, yet if he neither agree nor disagree the purchase is good.” *Co. Litt.* 3, a. And it is now settled that a mortgagee of the *whole term* stands in the same situation as any other assignee, and as such is liable to the covenants in the mortgagor’s lease, *even though he never enter upon the premises.* *Williams v. Bosanquet*, 1 *Brod. & Bing.* 238, 246.

With respect to an assignee of part of leasehold premises, it has very recently been adjudged that he is not liable to the covenants in the original lease, except as to the part which is assigned to him. The lessor may indeed sue such an assignee in the first instance, in respect of the whole rent. But the assignee may, by his plea, shew that his liability is confined to the particular part. And if, as to that part, he is a joint-tenant with others, who are not joined in the action,

therefore, it is intended that he shall not do so, an express provision or covenant should be in-

3 *Anstr.* 701.
Folkingham v.
Croft.

he cannot avail himself of that non-joinder, except by plea in abatement. *Merceron v. Dowson*, 5 *Bar. & Cress.* 479.

Between the *lessor* and an *under-tenant* there is neither privity of estate nor privity of contract; so that these parties cannot take advantage the one against the other of the covenants, either in law or in deed, which exist between the original lessor and lessee. The lessor, therefore, cannot sue the under-tenant upon the lessee's covenant to pay rent—to repair—to cultivate, &c., though the under-lessee be in the actual possession of the premises; nor can the under-lessee sue the original lessor for breach of his covenant for quiet enjoyment, though the disturbance be committed by the lessor himself. *Holford v. Hatch*, 1 *Dougl.* 183.

In conclusion, it may be observed, that in the case of an *assignment*, the covenants at law, being inherent in the estate, pass along with it from the assignor to the assignee. Express covenants running with the land stand upon nearly the same footing as covenants in law, and may always be taken advantage of by the assignee, who on the other hand will be bound by such covenants whenever they affect the present state of the land, even though he be not named; but if they respect something to have a future existence upon or in respect of the land, they will run with the land and be binding on the assignee, provided only he be named. Mere collateral covenants never run with the land, and are binding only between the covenanting parties and those persons who, upon the death of the parties, represent them, become possessed of assets, and remain answerable in respect of such assets. Moreover, an under-lessee is not liable to any *action of covenant* by the original lessor, whether he be in or out of possession of the premises, or whether the covenant be expressed or implied, or whether it be collateral or run with the land. It is, however to be remarked (as hinted in the

served to restrain him. And a covenant that the lessee shall not assign without the consent of the lessor, has been deemed a common and usual one.*

next paragraph in the text) that by the statute 4 G. 2, c. 28, the original landlord has a right of distress on the land which no assignment or under-lease can avoid: and in most leases an express proviso is inserted, that if the rent be unpaid for a given time, or the covenants be unperformed, it shall be lawful for the lessor to enter and re-possess himself of the land, and thenceforth for ever thereafter to hold and enjoy the same as of his former estate and condition. Neither can this proviso be avoided by any act of the lessee. As between the lessor and the land, the implied covenants are binding in every event, but the express covenants depend on the solvency of the lessee.

2 T. R. 425.
12 Ves. 395.
1 Camp. 20.

* In *Crusoe v. Bugby*, 2 Wm. Black. 766. 3 Wils. 234, a covenant "not to assign, transfer, or set over, or otherwise do or put away with this present indenture of demise," was held not to extend to an under-lease of part of the term, the words "otherwise do or put away" being construed to signify an entire disposal of the premises. But where the words were, "not to assign or set over, or otherwise depart with this indenture of lease," it was considered in practice, that an under-lease from year to year was a departure with the lessee's interest in the indenture for a time "otherwise than by an assignment or setting over for the whole term." An agreement for a lease is sometimes resorted to as an evasion of this covenant: but it is to be remembered, that the lessor cannot distrain on a tenant who enters into possession under such an *agreement*, for in such case there is no demise, either express or implied. In the language of the Court of Common Pleas,—when a person is so foolish as to enter upon the premises under an *agreement* for a lease, without a stipulation that in case no lease is executed, he shall hold for one year

Again, a lessor is not obliged to renew the lease (unless by custom): and therefore, if it be intended that the lessor should be compelled to do so, a covenant for that purpose should be also inserted. But if the lessor covenant to renew under "*the like covenants*," it will not extend to a *further covenant for renewal*.*

2 Bro. C. C.
636. Tritton
v. Foote, 3 Ves.
jun. 295.
6 Ves. 232.

certain, until the lease be granted, the landlord may turn him out without notice: but the effect is, that the lessor cannot distrain for the rent; he must bring his action. *Hegan v. Johnson*, 2 Taunt. 148. *Ante*, p. 20. 1 Stark. 308. In a late case it was held at *Nisi Prius*, that a deposit of a lease by way of mortgage is no breach of a covenant "not to let, set, or assign, transfer, set over, or otherwise part with the premises thereby demised, or that present indenture of lease, or his or their term or interest by that indenture granted, or any part thereof, without the special license, consent, and approbation of the lessor." *Doe dem. Pitt v. Laming*, 1 Ry. & Moo. 36. And on application at the Comptroller's Office for the *City of London*, the Editor was informed, that a mortgage is not an assignment within the condition not to assign usually inserted in city leases: but he felt great difficulty in relying on that answer as a good defence in an action at law, whatever relief it might have afforded in a Court of equity. He therefore advised a license to be obtained, as the only sure course of preventing doubt. The latter paragraph in the text has been distinctly overruled in *Church v. Brown*, 15 Ves. 258, where it was held, that under an agreement for a lease the lessor is not, without express stipulation, entitled to a covenant restraining alienation without license, as a proper and usual covenant; *et vide* 2 Swan. 247.

[*Doe v. Bevan*,
3 M. & Selw.
353.]

* A covenant on the part of the landlord for continued renewals, as it tends to create a perpetuity, is not favoured

Co. Litt. 53, a. A lessee for years is compellable to repair, &c.; and therefore if it be not intended that he

by any Court. A promise by the landlord to renew a lease in consequence of money already laid out by the tenant, was held by Lord Chancellor *Thurlow* to be *nudum pactum*, and not to be specifically performed in equity; and his Lordship further held, that the circumstance of the tenant's having subsequently laid out money, as it was voluntarily, could not alter the case; though had the tenant stated his intention, and the promise to renew had been founded on *that*, he would have been entitled to a specific performance. *Robertson v. St. John*, 2 Bro. Ch. Ca. 140; and see *Richardson v. Sydenham*, 2 Vern. 447. But where such a covenant is express and unequivocal, it will be duly enforced. *Bridges v. Hitchcock*, 5 Bro. P. C. 6. *Furnival v. Crew*, 3 Atk. 83. In one case the Court of King's Bench went so far as to hold, that the circumstance of the lessor's having frequently renewed a lease, gave a construction to an equivocal covenant for a perpetual renewal, and bound him continually to renew. *Cook v. Booth*, Cowp. 819. But this decision has been generally condemned, and may now be considered as exploded. See *Baynham v. Guy's Hospital*, 3 Ves. 295. *Moore v. Foley*, 6 Ves. 232. In a late case, where a lease for twenty-one years contained a covenant by the lessor at the expiration of eighteen years to grant a new lease, "with all covenants, grants, and articles contained in the original lease;" the Court of King's Bench held, that this covenant was satisfied by the tender of a new lease containing all the former covenants *except the covenant for future renewal*. And the judgment was affirmed in the Court of Exchequer Chamber upon writ of error. *Iggulden v. May*, 7 East, 237, 2 New Rep. 448. 9 Ves. 325. *Inchiquin v. Burnell*, Harg. Jur. Arg. In the case of leases renewable upon lives, it has frequently been determined, that such right of renewal will be lost, if the lessee neglects to renew upon a life dropping. *Baynham v.*

should do so, a covenant from the lessor to repair should be inserted.

The operative words in a lease are "*demise, lease, and to farm let.*"*

Guy's Hospital, 3 *Ves.* 295. *Eaton v. Lyon*, 3 *Ves.* 690. *Bayley v. The Corporation of Leominster*, 3 *Bro. C. C.* 529. *Willan v. Willan*, 16 *Ves.* 84. *The City of London v. Mitford*, 14 *Ves.* 41. *Maxwell v. Ward*, 11 *Price*, 3. 13 *Ib.* 674. 1 *McClel.* 458. A covenant for renewal is a covenant running with the land. *Isteed v. Stonley*, 1 *And.* 82. *Roe v. Hayley*, 12 *East*, 469. And it is observable, that a person having a partial interest in the lease, as a tenant for a less term of years, or a tenant for life, can compel contribution to a renewal fine. *Charlton v. Driver*, 2 *Brod. & Bing.* 345. [See also *White v. White*, 9 *Ves.* 554, as to contribution between the tenant for life and remaindermen. *Giddings v. Giddings*, 3 *Russ.* 260. See also 17 *Ves.* 485. 3 *Mad.* 491. 5 *Ib.* 471. *S. P.* 1 *Mad. & Geld.* 72. 2 *Russ.* 238. But where the deed or will creates no trust for renewal, and the lease contains no covenant to renew, the tenant for life is not bound to renew, although there is a custom for the lessor to renew at a given period on receiving a fine. *Capel v. Wood*, 4 *Russ.* 500. See also *Rop. Leg.* 1 Vol. 279—286, ed. 3. With respect to the renewal of leaseholds without a surrender of the underleases, see 4 *G.* 2, c. 28, s. 6. And in reference to renewals by ecclesiastical persons, see the restriction imposed by the 6 & 7 *W.* 4, c. 20, s. 64.

* Upon the question, what shall be considered a lease, and what merely an agreement, see 1 *Cru. Dig.* pp. 54--58. But by the statute 7 & 8 *Vict. c.* 76, s. 4, it is enacted, that a lease and surrender must be by deed in writing, but any agreement in writing to let or to surrender shall be valid, and take effect as an agreement to execute a lease or sur-

See 9 Vic c 105

2 *Bl. Com.* 319,
&c. *Touchst.*
280, &c. *Bac.*
on Leases, C.

See *ante*, Book I., Ch. II. Of Terms for Years; and as to leases by husband and wife of the wife's lands, ecclesiastical persons, corporations, guardians, &c. the books cited in the margin.

render; and the person who shall be in the possession of the land in pursuance, of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year. But the act is silent as to surrenders by act of law.]

CHAP. V.

OF AN EXCHANGE.

AN exchange [at common law which by the statute 7 & 8 *Vict. c. 76*, is now virtually abolished, was] a *mutual* grant of *equal interests*, the one in consideration of the other.* No delivery

2 *Bl. Comm.*
323. *Touchst.*
c. 16.

* As fee simple for fee simple ; estate for life for estate for life ; estate tail for estate tail ; freehold for freehold ; legal estate for legal estate ; copyhold for copyhold of the same manor. If the legal estate were in a trustee, the exchange must be made by and to him. So, if there were joint-tenants for life with the inheritance of the fee to one, the exchange must have been to them accordingly. But exchanges under inclosure acts are generally considered as not bound by these rules. Thus, lands of freehold tenure may be exchanged for lands of copyhold tenure within the same parish or manor—a tenant for life may exchange with a tenant in fee, provided the remainderman be not thereby injured (2 *Chit. Rep.* 251); an equitable tenant with a tenant of the legal estate, and a copyhold tenant with his own lord. But these allotments and alterations of the *possession* of the lands within a parish or manor can scarcely be called exchanges ; they are mere substitutions of one piece of land for another, without effecting any change or alteration of the title or interest. The lands taken in exchange by each person will be of the same tenure as the lands given by him

[*Stat.* 4 & 5
W. 4, c. 30,
s. 27.]

Co. Litt. 50, b.
Perk. s. 285.

was necessary on an exchange at common law ; but entry by each party was absolutely necessary to effectuate it.

Butl. n. (1) to
Co. Litt. 271, b.
s. 3.

If both parties die before entry, the exchange was void ; and if one died, his heir might avoid it.* Hence [even before the above statute, it was] sometimes preferable to make the parties (except as to corporate bodies, or others who cannot stand seised to an use,) execute reciprocal conveyances founded on the Statute of Uses, as those of lease and release ; which did away the necessity of entry. [But now by the third section of the above statute no exchange made upon or after the 1st of *January*, 1845, shall be valid at law except by deed.]

[4 & 5 *W.* 4,
c. 30, s. 25.]

in exchange, and be held by the same services, &c. ; and a clause is now usually inserted in all inclosure acts, communicating the title of the lands given in exchange to those taken in exchange.

* The exchange was not merely voidable, but absolutely void, according to *Lord Coke*, who speaking of exchanges says, “ the parties have no freehold in deed or law in them before they execute the same by entry, and, therefore, if one of them dieth before the exchange be executed by entry, the exchange is *void* ; for the heir cannot enter and take it as a purchaser, because he was named only to take by way of limitation of estate in course of descent.” *Co. Litt.* 50, b.

If an infant exchanged lands, and after his full age occupied the lands taken in exchange, the exchange was become perfect ; for at the first the exchange was not *void*, but voidable only ; for it amounted to a livery, and was also a benefit or recompense. *Co. Litt.* 51, a.

An exchange [at common law] could only be between *two parties*, though the *number of persons* was immaterial.* The word “*exchange*,” was the only operative word, and therefore indispensable, and it implied a *mutual warranty*.†

3 Wils. 483.

Harg. n. (1) to

Co. Litt. 50, b.

* That is to say, several persons might compose each party. Thus *A.* could not grant lands to *B.* in exchange for lands which *A.* was to receive from *C.*; but a tenant for life, tenant in tail, and reversioner on the one part, might exchange with a trustee of the legal estate, and a feme covert and tenant in fee of the equitable interest on the other part. *Co. Litt.* 50, b. 51, a. 2 *Shep. Touch.* 297, 298, ed. by *Prest. Bustard v. Coulter*, *Cro. Eliz.* 902. *Eton Provost v. Winton*, *Bp.*, 3 *Wils.* 496. The foundation of an exchange at common law, was a mutuality of interest, and an implied warranty, which engendered the right of re-entry in case of eviction. Neither of these principles were applicable to exchanges under inclosure acts, where the object is convenience of occupation and contiguity of possession merely. Hence it will probably be decided, if the question should ever come before the Courts, that the commissioners may, by their award, make an exchange as between three persons, for the convenience of each. *Cov. Inc.* 53.

† But by the Statute of Frauds (29 *Car.* 2, *c.* 3,) a writing is in all cases necessary, if the exchange be of freehold interest, or of a term exceeding three years. *Litt. sect.* 62. *Co. Litt.* 50, a. It is submitted that a statute use could not arise on the seisin acquired by an exchange at common law. The exchange was perfect in itself, and gave the legal estate. Besides, there could be no consideration moving from the *cestui que use* who must necessarily have been a third party, and consequently open to the observations of the last note. Exchanges have usually been made by mutual releases, the one in consideration of the other; but the title of the land given in exchange is involved in

[But now by the 6th section of the above statute it is declared that neither the word “grant” nor “exchange” shall have the effect of creating a warranty or right of re-entry, nor any covenant by implication.]

investigating the title of the lands taken in exchange. A late promising and worthy Editor of *Noy's Maxims* was, however, of a different opinion, but he cites no authority for his position. See *Byth. Noy*, p. 156.

[The reader is here referred to the stat. 4 & 5 *W.* 4, c. 30, for facilitating exchanges of land lying in common fields. 7 *Cru. Dig.* Ed. 4. Appendix 6. 6 & 7 *W.* 4, c. 115, ss. 35, 37, amended, 3 & 4 *Vict. c.* 31.]

CHAP. VI.

OF A RELEASE.

A RELEASE is the relinquishment of a right or interest in lands or tenements to another who has an estate *in possession* in the same lands or tenements.*

2 Bl. Comm.
324. Gilb.
Ten. 53.
Touchst. c. 19,
p. 320. Litt.
ch. 8, s. 444,
&c.

There are five species of release : 1st, *By way of enlargement* ; as if he in remainder in fee release to the particular tenant in possession. 2ndly, *By way of passing an estate* ; as when one coparcener or joint-tenant releases to the other. 3dly, *By way of passing a right* ; as when a disseisee releases to the disseisor.† 4thly, *By*

* Actual possession, however, is not at all times necessary : a *vested estate* is in many cases sufficient for the operation of a release. Thus if a man make a lease for years, remainder for years, and the first lessee enter, a release to the termor in remainder by the reversioner is good to enlarge his estate into a fee simple. *Co. Litt.* 270, a. n. (3).

† As to the distinction between releases of *estates* and releases of *rights*, it is observable, that the release of an *estate* occurs where there is a privity between the releasing parties. A release of a *right* occurs where no such privity exists, as in the case of discontinuance, disseisin, abatement, &c. : the disseisee may release his right to the disseisor, and then no

way of extinguishment; as if my tenant for life makes a greater estate than he is warranted in

estate passes, but only a bare right. *Co. Litt.* 266, a. 275, a. If *A.* seised in right of his wife, [tenant in fee] makes a lease for forty years to *D.* and afterwards *A.* dies, leaving his wife surviving, and she releases to *D.* generally, this is the release of an *estate*, and operates by way of enlargement of *D.*'s estate from a chattel to a freehold. But if *A.*, being so seised, makes a [feoffment] to *D.* *for life* (which [before the statute 32 *H.* 8, c. 28, was] a discontinuance of the wife's estate,) and after *A.*'s death his widow releases to *D.* generally, this is the release not of an *estate* but of a *right*, and operates by way of confirmation of *D.*'s lease for life, and also of the [tortious] reversion which the [feoffment] created, and which upon *A.*'s death descended on his heir. In the first case, the lease was not *void*, but *voidable* only: it divested not the wife's estate, but on the contrary, till avoided, bound it; and it is a maxim, 'that the estate which I may defeat by my entry, I may equally make good by my confirmation,' *Co. Litt.* 300, a.: therefore the wife, on the death of her husband, may confirm the estate of the lessee by release, which thus far operates as a release of right; but being made generally, it operates to *enlarge an estate* of the lessee from a chattel to a freehold interest, and in that respect it is a release of estate. In the latter example, the husband having [enfeoffed] *D.* for life, he thereby divested the wife's estate, and turned it into a mere *right*. By the [tortious operation of the feoffment] he also created a new reversion in fee in himself, which on his death descended to his heir at law: and the wife could not avoid these estates by her entry at the common law, but only under the statute 32 *H.* 8, c. 28, and see *Co. Litt.* 297, b. 326, a. 333, b. *Ritso.* 190. Her release, therefore, in the latter instance, was a release of that right simply.

There is also another distinction between the release of an estate, and the release of a right, which it is material to

granting, and I release to his grantee; or if the lord release to his tenant his seignorial rights. And, 5thly, *By way of entry and feoffment*; as when a disseisee releases to one of two disseisors. *Co. Litt.* 276, a. 278. *Butl.* n. 240.

In order to give operation to a release, it [was, previously to the statute 4 & 5 *Vict. c.* 21, and 7 & 8 *Ib. c.* 76,] necessary that the releasee had

observe here. The release of an estate admits of *qualification* at the will of the releasor; thus the lord may release his seignory to the tenant of the land, in fee, in tail, for life or years. But the release of a right admits no such qualification; if released but for a moment, it is extinguished for ever. *Co. Litt.* 274, a. 280, a.

It is further observable, that a release of a right to him who has a reversion or remainder is a release to him who has the freehold: so a release made to a tenant for life, or a tenant in tail, shall enure to him in the reversion or remainder, if they plead it: and so to trespassers and feoffees, but not to disseisors. *Litt. s.* 522. And as a release [of a right] cannot be for a part of the interest of the releasor, nor for a partial period of time, so neither can it be on a condition. *Noy*, 75. From this doctrine it follows, that to a release of a right, words of inheritance are not requisite; but to a release of estate, the releasee having no previous inheritance, and fiefs being only for life or in fee, according as they were originally granted, the release gives the estate to the releasee only for his life, unless it be expressly made to him and his heirs. *Co. Litt.* 273, b. (2). A release of all demands extinguishes all actions, real and personal, and is the most ample release a person can make. *Noy. Max. Ch. Rel. Byth.* ed. 176.

the seisin, or at least possession, of the premises, either by livery, by the Statute of Uses, or by actual entry ; and, therefore, if any conveyed by lease and release, who could not stand seised to an use, as a corporation, the lease, on which the release was to be grounded, must not [have been] be in the common way of bargain and sale, but by way of demise and lease at common law, *with actual entry by the lessee*. [But by the latter statute this is now no longer necessary ; for the lease for a year is dispensed with in the conveyance by lease and release by a corporation as well as by an individual. (a)]

[Where the lease for a year is still resorted to, care should] be taken that the premises in the lease, or bargain and sale, be at least commensurate with those in the release, as the release is only of the right to, or estate in, the premises of which the releasee is in actual possession ; and, consequently, no more can pass.

[(a) Much doubt existed whether under the statute 4 & 5 *Vict. c. 21*, a corporation could convey, without a previous lease for a year, by common law demise, perfected by entry ; but the glossory clause (*s. 1*) of the 7 & 8 *Vict. c. 76*, extends the meaning of the word 'person' to a corporation as well as to an individual : and, as a corporation, before the passing of the act, could without doubt have conveyed by lease and release (the lease being by common law demise, perfected by entry,) the language of the second section, explained by the first, clearly extends to a lease and release by a corporation.]

A release is the proper mode of extinguishing a right to, or an equity, or contingency, or possibility, in the lands of the releasee.

The operative words in a *release* are, "*release*," or "*remise, release, and for ever quit claim and discharge*."

CHAP. VII.

OF A CONFIRMATION.

2 *Bl. Com.* 325.
Gilb. Ten. 75.
Touchst. 311.
Litt. ch. 9,
 s. 515, &c.
Plowd. 397.

A CONFIRMATION differs essentially from a release, as it only validates and establishes that estate or interest which the tenant *already has*; whereas a release is the relinquishment of a right which the tenant had not before. So far as the particular estate is *increased*, it is *not* a confirmation; it is not the *strengthening of the tenant's estate*, but the *giving him a greater*.*

* Estates which are void cannot be confirmed; but those which are voidable only may. *Co. Litt.* 295, b. Thus a lease by a tenant for life is absolutely void at his death, and admits of no confirmation by those in remainder. *Doe v. Archer*, 1 *Bos. & Pul.* 531. As to the distinction between void and voidable estates, see 1 *Pow. Mortg.* 209, 210, a. 2 *Ibid.* 723, a.

In reference to the effect of a deed of confirmation, it is laid down in *Brabroke v. Inskip*, 8 *Ves.* 417, that where a person is called upon to join in a conveyance for the purpose of obviating a specific objection to the title, he will not be bound by it as to any interest of which he has not been apprised. But if he consents to join in the conveyance upon being told generally that there are objections to the title, he must be taken to have inquired into the nature of those

The operative words are, “*ratified and confirmed* :” though for safety, it is usual and pru-

objections, and cannot afterwards raise a question as to the extent of his information. This rule has received a practical illustration in the great case of *Cholmondeley v. Clinton*, where a deed of confirmation, dated 1794, was held not to confirm the title generally, but only as to the particular point for which it was applied for and obtained. 2 *Meriv.* 355. A confirmation to a tenant of the freehold or inheritance cannot be so worded as to have a less operation than that of confirming the whole estate; and therefore a confirmation to such a tenant, either of the lands or of his estate in them for any term or period, is a confirmation of the whole freehold or fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of the whole fee. It is otherwise in the case of a *term of years*. A confirmation may be made of *part* of the term. The reason of the distinction is, that an estate of freehold or inheritance is considered as integral and indivisible; but as years are several, the term which is composed of them is necessarily fractional and separable, and may consequently be confirmed in part by using proper expressions for the purpose. This confirmation, however, must be by apt words; for if a person confirms the *lease*, or *demise*, or *estate* of the tenant for years for part of the term, as the words ‘lease,’ ‘demise,’ or ‘estate,’ signify *all* the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary, and thereby the whole term will be confirmed. The confirmation should be ‘of the *land* for *part* of the term,’ if it be intended that it should have a partial operation merely. *Co. Litt.* 297, a, and n. (1). 1 *East*, 502. *Skin.* 543.

dent to insert the words "*given and granted*," also.

[*Story v. Johnson*, 2 *You. & Col.* 586. 607.]

[But it is not necessary that formal words should be employed to constitute a confirmation; it may be effected by a recital, or a recognition of the voidable estate in a deed, executed by the person who has the power to confirm.]

CHAP. VIII.

OF A SURRENDER.

A SURRENDER is the yielding up, or returning, or relinquishing, of *a smaller estate*, to him who has a *greater estate* in the same lands in remainder or reversion *immediately expectant upon such smaller estate* ;* for if there be an estate to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, *A.* cannot surrender to *C.* *by reason of B.'s mediate or intervening estate.*† If *A.* pass his estate to *C.* it will *not be*

2 *Bl. Com.* 326.
Touchst. ch. 17,
 p. 390.

* It differs from a release in that the smaller estate is conveyed to the greater, (and for this purpose every estate in reversion is considered greater than the particular estate in possession) whereas in a release the greater estate is conveyed to the less. That a term for years in possession will merge in a term for years in reversion, has been distinctly acknowledged in *Stephens v. Bridges*, 1 *Madd. & Geld.* 66; *et vide Tamlyn on Terms*, 200. *Cro. Eliz.* 302. 3 *Prest. Conv.* 193. [See *Cru. Dig.* Vol. 6, p. 476, s. 40, 4 ed. 1835.]

† Therefore, where an estate was limited to *A.* for life, remainder to *B.* for life, remainder to *C.*, the eldest son of *A.*, in fee; and *A.* in the lifetime of *B.*, in consideration of an annuity of 14*l.* to be paid by the said *C.* to him out of the premises, and for other considerations, did, by deed, give, grant, surrender, and confirm unto the said *C.* and his heirs

a surrender, any more than if made to a stranger, who had nothing in the lands.

As a surrender is, generally, for the advantage of the surrenderee, the law will often presume his assent to it ; but the particular tenant cannot enforce it upon him *nolens volens*, and so get rid of his obligations ; and it is therefore prudent to make the surrenderee a party, and express his consent, that it may be apparent on the very face of the deed.*

A surrender might have been by parol ; but

the said premises ; it was held, that the deed could not operate as a *surrender* according to the intent of the parties, upon account of *B.*'s intermediate estate for life ; but that there being a *consideration of blood* between the father and son, the conveyance should operate as a *covenant to stand seised*. *Doe dem. Woolley v. Pickard*, 1 *Saund.* 236, *c.* note.

This principle will also illustrate the common limitation to trustees to preserve contingent remainders. It has long been settled, that the estate of the trustees, being confined to the life of the preceding tenant for life, is a vested estate of freehold ; and, therefore, that the tenant for life cannot surrender to the ulterior remainderman on account of this interposed estate. *Dormer v. Fortescue*, 3 *Atk.* 123, 135 ; 4 *Bro. P. C.* 353, 505 ; *Co. Litt.* 337 b. (2).

* As there is necessarily a privity of estate between the surrenderor and surrenderee, no livery of seisin is necessary to perfect a surrender. 2 *Bl. Com.* 326. In short, no other act is requisite to perfect a surrender than the bare grant : the consent of the surrenderee to accept the surrender is presumed till the contrary be shewn. *Thompson v. Leach*, 2 *Salk.* 618.

now, by the Statute of Frauds it must be by deed or note in writing, signed by the surrenderor, or his agent, lawfully authorized by writing, or by act or operation of law.*

* Upon this clause it was held by *Lord C. B. Gilbert*, in *Magennis v. McCulloch*, *Gilb. Eq. Ca.* 236, that a lease for years could not be surrendered by simply cancelling the indenture; there must be a writing, signed by the party; but a deed was not absolutely necessary, the words of the statute being by *deed or note in writing*. *Farmer v. Rogers*, 2 *Wils.* 27. If the surrender were made by note in writing, there was no occasion for a stamp-duty before the last stamp-act; but by stat. 55 *Geo.* 3, c. 184, a stamp is required to be impressed on a surrender by whatever means it be accomplished.

[An imperfect notice to quit by a tenant from year to year might be treated by the landlord as a surrender in writing, under the third section of the Statute of Frauds. *Aldenburgh v. Peaple*, 6 *Car. & P.* 212; it could not, however, so operate, if the notice to quit is for a future day; because there cannot be a surrender to operate in *future*. *Weddell v. Capes*, 1 *Mee. & Wel.* 50. *Doe v. Milward*, 3 *Ib.* 328. But now by the fourth section of the 7 & 8 *Vict. c.* 76, it is enacted that surrenders in writing must be by deed, although an agreement to surrender may be valid, as an agreement to execute a surrender.

By the stat. 1 *W.* 4, c. 65, ss. 12, 13, repealing 29 *Geo.* 2, c. 31, infants *fèmes covert* and committees of lunatics are enabled, under the direction of the Court of Chancery, to surrender leases for the purpose of obtaining renewals.]

Surrenders by implication remain, it is presumed, as they did at common law, being expressly excepted out of the Statute of Frauds, [and the above statute of 7 & 8 *Vict. c.* 76, mentioning only surrenders *in writing*.] Thus if a lessee for life accept from the lessor a lease in writing, though it be only for years, the estate for life will be surrendered and merged in law; for the lessee, by his

Sand. Uses,
360.

The operative words in a surrender are, “*surrendered and yielded up* ;” though they are usually preceded by the word *granted*.

acceptance of the second lease, admits that the lessor had power to grant it, which he could not have unless the former lease were merged. *Davison v. Stanley*, 4 *Burr.* 2210. *Roe dem. Berkeley v. Archbishop of York*, 6 *East*, 86. And it is equally a surrender, though the second lease be limited to commence at a future day (*Ive's case*, 5 *Rep.* 11, b. *S. C. Cro. Eliz.* 522. *Mellow v. May, Moore*, 636); or upon condition to be void upon a contingency, which afterwards happens so as to render the new lease void *ab initio*; *Fulmerston v. Steward*, *Plow.* 107, b. And a surrender in law is sometimes of greater force than a surrender in deed; as where a lease for years is made to begin at Michaelmas next, this future interest cannot be expressly surrendered, because it is not an estate, and there is no reversion wherein it may drown: but by a surrender in law it may be merged; as if the lessee before Michaelmas takes a new lease for years, either to begin presently or at Michaelmas, this acceptance of the second, is a surrender in law of the former lease. *Co. Litt.* 338, a. But if a lessee for years accept a new lease by indenture of *part* of the land previously leased, it is a surrender only for that part, and not for the whole. 2 *Roll. Abr.* 498, (M.) *pl.* 1; and see further, as to surrender in law, the case of *Doe v. Johnston*, 1 *McC.* & *Yo.* 141. [See further on surrenders, *ante*, pp. 56, 57.]

[*Mr. Preston* in discussing the doctrine of implied surrenders, observes, that the cases seem to have been determined on the ground of inconsistency in the several contracts; because it is impossible that the former contract can continue in force, and the second operate according to the intention of the parties as expressed in that contract; and that, from this inconsistency, the law draws the conclusion, that the former contract has been abandoned and annulled, the parties having entered into a new agreement. 3 *Conv.* 162, ed. 3.]

CHAP. IX.

OF AN ASSIGNMENT.

AN assignment is, properly, the transfer of one's whole interest in *any* estate; but it is now generally appropriated to the transfer of *chattels*, either real or personal, or of *equitable interests*.*

2 Bl. Comm.
326.

* If the assignment be of all the assignor's estate and interest, to hold from a day to come, there is an obvious repugnancy between the premises and *habendum*; the former conveying all the assignor's interest in the term, and the latter permitting the previous portion of it to remain in him. Hence it has been supposed that an assignment *in futuro* is void; and such perhaps is its effect at law, if the *premises* correspond with the *habendum*: but it is a rule, that if the whole interest be conveyed by the premises, the *habendum* cannot limit a less estate. Thus if lands are conveyed to *J. S.* and his heirs, *habendum* to him for life; *J. S.* has an estate in fee by the premises, and the *habendum* is void. 8 Co. 56, b. 2 Co. 24, a. Plowd. 152, 153. 2 Bac. Abr. 494. So if there be an *express* estate limited to *A.* in fee by the premises, *habendum* after the death of the grantor to *A.* in tail; in this case the *habendum* is void, and *A.* shall take a present estate by the premises. *Carter v. Madgwick*, 3 Lev. 339; *et vide Lilley v. Whitney*, Dyer, 272, a, pl. 30. 2 Roll. Ab. 66, pl. 4. Hob. 171. Moor. 881, pl. 1236. Therefore, as every assignment must necessarily embrace

Ante, b. 2, c. 4.

An *assignment* of a term differs from an *under-lease*, in that the *former* is the parting with the *whole*, and the *latter* with a *portion only*, of *one's interest or estate*.*

The operative words are, “*assigned, transferred, and set over* ;” though usually the word “*granted*” is inserted, and in the assignment of *chattels*, the words “*bargained and sold*” also.

the whole estate and interest of the assignor, it cannot in fact convey an interest *in futuro*, although it purport so to do on the face of it.

* And *that* the former, not the latter, portion of the term. The Statute of Uses does not apply to chattel interests, so that the case cannot be helped by resulting use ; and it is apprehended, that if the former portion of the term be clearly and unequivocally reserved to the assignor, the assignment is void ; for as the term does not immediately pass out of the grantor, the assignment operates nothing.

CHAP. X.

OF A DEFEASANCE.

A DEFEASANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone.

2 *Bl. Comm.*
327. *Touchst.*
ch. 22, p. 396.

A defeasance is now, however, seldom resorted to, as it is much preferable to make the conditions apparent in the deed, so that the deed shall be complete in itself. For, as the conveyance is absolute, should the defeasance, which is contained in a separate instrument, be lost, the proof of the condition might be difficult, and often impossible.*

[* Defeasances are of two kinds—those which relate to estates of freehold and inheritance, and those which affect chattels and executory interests, such as rents, annuities, conditions, warranties, covenants, and the like. *Touchst.* 396. Defeasances of the former class must be made at the time of the creation of the estates to be thereby defeated. But the latter kind may be made at any time after, so they be *codem modo*, and with the consent of all those who were parties to the creation of the chattels or other interests to be defeated

or annulled. For the other requisites of a defeasance, see *Touchst.* 397. The learning of a defeasance is now not unfrequently resorted to in order to obviate the consequences of giving a license to assign, to a lessee whose lease contains a clause against assigning without the lessor's consent; for, according to *Dumpor's* case, 4 *Co.* 119, a license, once given, entirely discharges the condition. The mode of effectuating this is mentioned in a former note, p. 40—41. See also 2 *Pres. Conv.* 167, 199, and Form VII. Appendix, ed. 3.]

CHAP. XI.

OF A COVENANT TO STAND SEISED.*

A COVENANT to stand seised to the use of another must be *by deed*; for a covenant cannot be *by parol*. It must be by a person *seised* of lands or tenements; and, consequently, cannot embrace an equity, or right, or contingency, &c.

2 *Bl. Comm.*
338. *Touchst.*
511, 512.
Sand. Uses, 2v.
78. See also
Comm. Dig.
Cov. (G.)
2 *Lev.* 9.

[* A covenant to stand seised is one of those conveyances which do not operate by transmutation of possession; that is, it does not transfer the seisin to another to raise the use in the covenantee, but that seisin remains in the covenantor, he standing seised *to the use* of the covenantee; so that if in consideration of blood, *A.* covenants to stand seised to *B.* and his heirs to the use of *C.* and his heirs, *B.* will take the use, and *C.* only a trust estate. A bargain and sale is another conveyance not operating by transmutation of possession or seisin, and so is an appointment under a power to appoint the use. *Vide supra*, p. 245, n., pp. 249, 265—267. But bargains and sales under the Statute of Uses must be distinguished from bargains and sales by executors having authorities to sell under wills, and by persons having authority under acts of Parliament, as commissioners under the Bankrupt Act, &c.; for these must be considered as common law assurances, and pass a seisin at common law, upon which uses may be declared. *Prest. 3 Abst.* 112, 124, *supra*, p. 274, n.]

Vide infra,
Ch. Lease and
Release, note
(a).

though it may be of a *reversion* or *vested remainder*; for the reversioner or remainderman *is in the seisin*. It [could not, previously to the late statutes 3 & 4 W. 4, c. 74, as to *England*, and 4 & 5 Ib. c. 92, as to *Ireland*] be by a tenant in tail, except as to his own life.* It must be *in consideration of marriage or blood*; for a covenant to stand seized *to the use of a stranger* would be void. It must *not* be in consideration *of money*; for that would be a bargain and sale. But it is not necessary that the consideration of blood be expressed: for if a person covenant to stand seized to the use of his *wife, (a) son, or the*

* A *covenant to stand seized* is an innocent assurance; and [before the above statutes were passed, it was] a rule, that an estate granted by a tenant in tail to commence *after* his death by an innocent assurance was void; and it followed, that if a tenant in tail covenanted to stand seized to the use of himself for life, with remainder over, or to uses to commence after his decease, such covenant, estate, and remainder were void, because the title of one issue would commence before any seisin could arise under the uses or the remainders, *Doe v. Whittingham*, 4 Taunt. 20. [But now, if the covenant to stand seized be inrolled and in other respects in conformity with the above statutes, it is conceived that it will be as effective for the purpose of barring the entail and remainders as any other mode of assurance; ss. 40, 41, E. 38, 39, I.] But if a *tenant in fee* covenants to stand seized to the use of himself for life, with remainder to *J. S.*, to whom he is related, the covenant will be good for the sake of the remainder. *Per Holt, C. J.*, in *Machell v. Clarke*, 2 Ld. Raym. 778, *et vide* 1 Pres. Abst. 390, 406.

(a) [In a covenant to stand seized, in consideration of an intended marriage, to the use of the wife for life, and in

like, it will be sufficient; as the consideration would be apparent.* A person may covenant

default of issue of the marriage, *to the right heirs* of the wife, the latter limitation takes effect according to the rule in *Shelley's case*, by vesting the remainder in fee in the wife. *Hood v. Pimm, Tyr. & G.* 1118.]

* It has long been *vexata questio*, whether this consideration may be averred in the teeth of a deed which professes to have been made in consideration of money only. If the motive inducing the deed be a sum of money, and "divers other good causes and considerations," then the money consideration failing, the divers other considerations may fairly enough be entered into; but if the deed be made in consideration of money alone, it imports that no other consideration superinduced the conveyance. The language of *Lord Hardwicke* on this point is, "where any consideration is mentioned, as of love and affection only, if it is not said also, *and for other considerations*, you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is a negative to any other." *Peacock v. Monk*, 1 *Ves.* 127. The rule, however, is thus laid down in *Cromwel's case*, 2 *Co.* 76, a, "when a fine, feoffment, or other conveyance imports an express consideration, a man may aver by word another consideration, *which stands with the consideration expressed*; but the parties cannot by parol make any averment *against* the consideration expressed;" and this expression of the rule seems to be preferable to that proposed by *Lord Hardwicke*, *Doe v. Sherlock*, 1 *Fox & Smith*, 79. But it is not sufficient to prove a *kindred* merely, it must also be proved that the deed was wholly or in part founded on the consideration of that kindred; the mere existence of the fact of kindred does not necessarily imply that the deed was founded upon it, especially

to stand seised to an use *in futuro*, as from Christmas next ; or, if he be seised in fee-

where a valuable consideration is expressed, and no other consideration is referred to by the deed.

It is not exactly settled what degree of relationship is necessary to support a covenant to stand seised. The kindred between second cousins would perhaps be sufficient, if the fact were noticed in the instrument ; but if the relationship be not mentioned in the covenant, then it is questionable, whether the tie could be considered so strong between second cousins, as to induce a valuable gift from the one to the other of them, without the accompaniment of friendship, acquaintance, or some such cause ; and it is to be recollected, that friendship, acquaintance, &c. form neither good nor valuable considerations in the eye of the law ; besides it would be extremely difficult to presume, that a kindred comparatively so remote as that between second cousins was the consideration of the deed without some evidence of a wish on the part of the covenantor to keep the property in his family, or that he had no nearer relation, or the like. In *Goodtitle v. Petto*, the lessor of the plaintiff was the nephew of the covenantor, and the Court was of opinion that he had title to recover, because he was named in the deed ; and though it was not stated that he was nephew to the covenantor, yet being expressly named, he might aver himself within the consideration. 2 *Stra.* 934. *Mr. Sanders* says (2 *U.* 81), that if a man covenant to stand seised to the use of his wife, son, or *cousin*, without saying in consideration of the natural love he bears towards them, the covenant will raise the use ; citing *Bedell's* case, 7 *Co.* 40, which is an indifferent authority to this purpose, the relationship in that case being between a father and son, and the word *cousin* being evidently thrown in by the reporter ; at all events it is but a *dictum*, and the books do not afford an instance of a covenant being brought before the Courts, supported merely

simple, that his heirs shall stand seised after his decease.

by an averred relationship between *two cousins* of any degree.

If a man covenant to stand seised to the use of himself for life, with remainder to trustees for supporting contingent remainders, with remainder to his first and other sons in tail, if the trustees are not the covenantor's relations, no use will vest in them, but the remainders over will be good. This is said to be one reason why covenants to stand seised have fallen into disuse. 2 *Sand. U.* 83.

From this chapter it will appear, that covenants to stand seised are always voluntary. And it is an invariable rule of the Court of Chancery, "never to decree specific performance of a voluntary covenant, which is in equity as no covenant at all, and only a nominal one in law." 2 *Eden*, 294. It has been expressly decided, that limitations in a marriage settlement to the brothers of the settlor are not good against a subsequent purchaser for valuable consideration. *Johnson v. Legard*, 3 *Madd*, 283. See also *Sutton v. Chetwind*, 3 *Mer.* 248. Hence [if a person having covenanted to stand seised of freehold lands, were to covenant to surrender copyhold to similar uses, the latter covenant would be void against a purchaser for value;] and a covenant to assign leaseholds in a similar manner would, it is conceived, be equally futile against a subsequent assignment for valuable consideration; and whether the purchaser has notice of the previous covenant or not, will not make any difference, as appears in the chapter on Gifts, *ante*, p. 306. As to the freeholds, the covenant is executed by the Statute of Uses; but as to the leasehold and copyhold, it is executory, and a surrender or assignment can only be enforced in a Court of equity where the consideration is such as that Court acts on.

[1V. *Cru. Dig.*
442—3, ed. 4.]

A power to appoint to any person generally cannot be reserved in a covenant to stand seised, for between the appointee and the covenantor there may be no relationship

The proper word is "covenant"; but other words may be tantamount;* as, if a person

whatever. If, however, the power be restricted to an appointment between the relations of the covenantor, it is generally considered that it will be good. *Goodtitle v. Petto, Fitzg. 2 Barn. 10. 2 Stra. 934.*

* "*Dedi et concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, &c.; but a release, confirmation, or surrender, &c. cannot amount to a grant, &c., nor a surrender to a confirmation or release, for these are peculiar conveyances destined to a special end." *Co. Litt. 400.* It is an established rule, that a deed shall never be laid aside as void, if by any construction it can be made good. *Hob. 277. Earl of Clanricarde's case. Shep. Touch. 82, 83.* Therefore, where a man seised in fee of a rent, granted it by deed to one who was his kinsman, and there was an attornment to the grant, but it was made by a person who was not the real tenant of the land, and as such void; though the intent appeared that the deed should operate as a grant at common law with an attornment, yet since it could not pass that way, it was adjudged that the deed being made to a relation should operate as a covenant *to stand seised*. *Sanders v. Saville, 3 Lev. 372.* So where a man by deed gave and granted land to another, with a letter of attorney to make livery, but which was never made; yet as the grant was to a relation, it was held to operate as a *covenant to stand seised*. *Osman v. Sheafe, 3 Lev. 372.* So a deed made by a man to his daughter, by way of bargain and sale, but which could not take effect as such for want of a money consideration, has been held to operate as a *covenant to stand seised*. *Crossing v. Scudamore, 1 Vent. 137;* and see *Baker v. Lade, 3 Lev. 291. S. C. 4 Mod. 150. Wats v. Dix, Sty. 204. Bedell's case, 7 Rep. 40, b. 2 Roll. Abr. 786, (O), pl. 1.* So a deed intended to be a *feoffment*, but which was void as such for want of *livery*, being made to a *relation* of the grantor, has

“*bargain and sell*” in consideration of *blood* or *marriage*, it will be good *as a covenant to stand seized*.

been held to operate as a *covenant to stand seized*. *Tomlinson v. Dighton*, 1 P. Wms. 163. *Arg.* 2 Wms. Saund. 96, a. n. (1). And it has been decided, that a deed with words of *release* may be either pleaded as a *grant*, or as a *covenant to stand seized* to uses. See *Roe v. Tranmarr*, Wills, 682, and 2 Wils. 75. [In the recent case of *Downsworth v. Blair*, 1 Keen, 795, the question was raised but not settled, whether an instrument, defective as a *release* or other assurance, can operate in equity as a *covenant to stand seized* where the covenantee is a stranger in respect of blood or marriage to the covenantor, but connected by marriage with the sister of the covenantor for whose use the covenant to stand seized is made.] It is a question whether the words *limit* and *appoint* in a deed may in the absence of the word ‘grant,’ operate as words of *grant*, so as to pass a reversion. [In the case of *Shove and others v. Pink*, 5 T. R. 124, Lord Kenyon, C. J. said, that “if it were necessary to decide the point, he did not see why the instrument in question, which contained the words ‘limit and appoint’ but not ‘grant,’ should not operate as a grant of the reversion. It had never been held necessary, that the word ‘grant’ should be used in a grant, it being sufficient if the intention to grant were manifest by a deed.” In the cases cited below the word ‘grant’ occurs, but to say, that because it is the technical operative word, no other word will be equally efficacious, would seem to assign a magic to words, which the good sense of the Courts has repudiated, the intention of the parties, if it can be legally carried into effect, being the rule of the Courts in the construction of written instruments: *et vide per Lord Mansfield in Goodtitle v. Bailey*, Cowp. 600.] So an instrument in the form of a grant may operate as a surrender; and it was ruled by Lord Kenyon at the Stafford

As soon as the use is raised, it is executed by the statute without any enrolment, though the use be in fee.

assizes, that an instrument in the form of a surrender might operate as a covenant to stand seised to uses. 3 *Prest. Abst.* 22. Where *A.* being possessed of a term of 999 years by lease and release granted, bargained, sold, and demised it to trustees, on certain trusts, with remainder to the heirs of his wife, and covenanted that he was seised in fee; it was held, that though the settlement could not operate as a lease and release, yet *A.* being in possession, and the word "grant" being in the deed, it should take effect as a *grant* or assignment of all his interest at law. *Marshall v. Frank, Prec. in Ch.* 480. And a [freehold lease for lives containing the words, demise, grant, and to farm, let,] has been held to operate as a grant in a case where there was a recital of an existing estate so as to create a reversion; and it is observable, that a grantor cannot gainsay an averment in his own deed; by *that* he is estopped. [See *Right v. Bucknell*, 2 *Bar. & Adol.* 278.] *Doe v. Sherlock*, 1 *Fox & Smith*, 79. *Doe v. Saunders*, *ib.* 18, *infra*, p. 360. *Rees v. Lloyd*, *Wightwich*, *R.* 123. See also the late case of *Haggerston v. Hanbury*, *infra*, p. 356—357; where a bargain and sale, though enrolled, was held to operate as a grant, there being an outstanding term for years.

[In *Spyve v. Topham*, 3 *East*, 115, a deed intended as a release could not so operate, because the lease for a year was made to *Bass* the trustee, and the release by mistake to *Topham* the purchaser (instead of to *Bass*) and his heirs, to the usual uses to bar dower, the Court of K. B. held the deed good as a grant; the word 'grant' was used in the operative part of the release. By the 6th section of the 7 & 8 *Vict. c.* 76, it is enacted, that the word 'grant' shall not have the effect of implying a warranty, or right of re-entry, or of creating a covenant by implication, except in cases where by act of Parliament, such effect shall be given to the word 'grant.']

[*Doe v. Cole*,
7 *Bar. & Cress.*
243.]

CHAP. XII.

OF A BARGAIN AND SALE.*

A BARGAIN and SALE differs from the covenant to stand seised, as it must be in *consideration of money*, though that consideration be only nominal. If the use to be raised by it be for a *freehold interest*, it must be *inrolled*.† In this, as in the last species of conveyance, there must be *a person to stand seised*; and, therefore, in the case of a corporation, some other mode should be adopted. There must be *an estate in him of which he has the seisin*, as an *estate of freehold in possession, reversion, or remainder*; not a *mere right, contingency, or possibility*; and there must be *a person capable of making the use*.

2 *Bl Comm.*
333.
Touchst. c. 10,
p. 221.
2 *Sand. Uses*,
43.

See 2 *Leon.*
121. *Ca.* 168.

And it has been already observed, that an use cannot be limited on a bargain and sale to any but the bargainee.‡

Ante, p. 249.

* *Vide supra*, p. 347, note.

† [It is conceived that if a deed is intended to operate strictly as a bargain and sale and not under the 7 & 8 *Vict.* c. 76, it must be enrolled, notwithstanding the second section of the act, *vide supra*, 250, 296.]

‡ Before the Statute of Uses, a *contract* for the sale of

The operative words are “bargain and sell.”

land raised a use, as in this day it raises a trust; to convert that use into a legal estate, an actual conveyance was requisite; but now the Statute of Uses supplies that conveyance, and transfers the seisin of the vendor to the use of the vendee, who having thus the seisin and the use, becomes seised of the legal estate, without any further conveyance. Immediately after the Statute of Uses came the Statute of Enrolments, 27 *H.* 8, *c.* 16, which requires every bargain and sale of a freehold interest to be enrolled in Chancery within six months after its date; consequently, if the common agreement for purchase were enrolled on a sufficient stamp, it would operate as a valid conveyance by way of bargain and sale without any further legal instrument. [This last proposition, it is submitted, is at least questionable: the statute 27 *H.* 8, *c.* 16, requires that an instrument to operate as a bargain and sale must be indented and sealed.] From these observations, it is plain, that a use cannot be surmounted on the use thus executed by the statute in the bargainee, for that would be a use upon a use, and therefore a mere trust.

In a late case, a tenant in tail, in order to make a tenant to the *præcipe* for suffering a recovery, by indenture duly enrolled, granted bargained and sold the lands of which he was seised in tail to two persons *to the use* of one of them, and that one was made the tenant to the *præcipe*, upon which a recovery was suffered. An objection was afterwards taken to the recovery, on the ground that the tenant [was not solely seised of the entirety, the bargain and sale conveying the use or legal estate to the two bargainees, as joint-tenants in fee, and that the second use to the tenant to the *præcipe* was inoperative, so that he had the legal estate of one moiety only when the recovery was suffered.] This objection was considered fatal, but there being an outstanding term, the Court of King's Bench certified, that the bargain and sale operated as a good *grant* of the reversion, and passed the freehold of

the entirety to the tenant to the *præcipe*; and that, consequently, the recovery was valid and effectual. *Haggerston v. Hanbury*, 5 Barn. & Cress. 101.

The enrolment of a bargain and sale must be made within six *lunar* months from the day of the date, if the deed have a date, and if not, within six lunar months from the time of its *delivery*. *Hob.* 140. 2 *Inst.* 673. *Shep. Touch.* 223. It may be made either upon the day of the date (2 *Inst.* 674), or upon the last day of the six months, reckoning the day of the date *exclusively*. *Thomas v. Popham*, Dy. 218, b. The legal estate is vested in the bargainee by the Statute of Uses upon the execution of the deed; but the Statute of Enrolment obstructs the operation of the conveyance until it is enrolled. The enrolment, however, has, for most purposes, a relation to the delivery of the deed (2 *Inst.* 875), and thereby avoids all mesne incumbrances and conveyances made by the *bargainor* between the delivery and enrolment. *Mullery v. Jennings*, 2 *Inst.* 674. *Thomas v. Popham*, *Dyer*, 218. *Owen*, 70.

A bargain and sale being what was termed an innocent assurance, passed merely what the grantor might lawfully convey. It could not, therefore, work a discontinuance (*Gilb. Uses*, 297. *Co. Litt.* 332, b), or create a forfeiture. *Gilb. Uses*, 102. *Hard.* 416. [But by the statute 7 & 8 *Vict. c.* 76, s. 7, no conveyance can have a tortious operation by creating an estate by wrong.] If a tenant in tail conveys in fee by bargain and sale, the bargainee has a base fee, determinable on the death of the tenant in tail by the *entry* of his issue. *Seymor's case*, 10 *Co.* 95. *Machil v. Clark*, 2 *Salk.* 619. 1 *Atk.* 2. Whether a tenant in tail afterwards could have levied a fine to bar the issue is a point which is noticed in the chapter on *Fines*.

From the general characteristics of a bargain and sale, as explained in this chapter, it is manifest, that such an instrument cannot contain a power of appointment generally. To support a bargain and sale, a money consideration must pass between the bargainor and bargainee; and to the perfection

of this instrument, the consideration must be paid at the time the deed is executed, otherwise no use will arise, and then nothing passes from the bargainor, and so the deed is completely nugatory at the time it is executed. Now between the bargainee and an appointee under a power there cannot pass a present consideration, and consequently no use can arise; and as the seisin and the use are not separated, the statute cannot operate, consequently nothing is drawn out of the bargainor, neither the use by the deed, nor the seisin by the statute. The deed and the statute therefore operate nothing, and the whole is futile and void. *Et vide Gilb. Uses, 46.*

CHAP. XIII.

OF A LEASE AND RELEASE.*

WE have already remarked, that [irrespectively of the 4 & 5 *Vict. c. 21*, and 7 & 8 *Ib. c. 76*,] a

2 *Bl. Comm.*
339. 2 *Sand.*
Uses, 60.
Bull. n. (1).
Co. Litt. 271, b.
Ante, 36.

[* This is another of those conveyances which are said to operate by transmutation of possession or seisin. The bargain and sale for a year gives a use, to which the statute annexes the possession, for a year; and then, if the release be made to the bargainee or lessee for a year, *to uses*, he thereby takes a momentary interest, called the *seisin*, to serve the uses limited; and which are at one and the same instant executed in the *cestui que* use. If there are no uses, the release being made to the bargainee or lessee for a year in fee, the statute is not brought into operation upon the release; but the releasee takes by the common law, by way of enlargement of estate. The student will mark the distinction between the legal possession of the freehold which gives the freeholder the right to take the rents and profits which is called his seisin, and that *seisin*, above alluded to, which derives its peculiar character from the Statute of Uses: the latter confers a momentary interest in the feoffees, releasees, or grantees, merely to conduct the use in its transit through them to the *cestui que* use, in whom the use is executed *instantly* by the operation of the statute: the uses thus executed confer the legal estate, either in possession, remainder, or contingency, according to the limitations. Nothing remains in the feoffees. &c.; though, where the uses

release can only be made to a person in the possession or seisin of the lands ; and, therefore, if a conveyance of the freehold is intended to be made to a stranger, without the formalities of livery, an estate for a year, or other definite time, may be made to him in order to give him such possession or seisin, and so make him capable of receiving a release.* This may be done by a conveyance at common law, or under the Statute of Uses.

If an estate for a year be granted at common

are in contingency, some are of opinion that a possibility of seisin remains in the feoffees, &c. to serve or supply the contingent uses as they arise. *Supra*, 252.]

* In Ireland, the actual existence of a lease for a year has not for many years been required ; it was sufficient if the release contained the usual reference to it. By the 9 *G. 2*, *c. 5*, *s. 6*, [1 *G. 3*, *c. 3*,] (Irish stat.) it is enacted, that in all cases the *recital* of a lease for a year in the deed of release shall be deemed and taken to be full and sufficient *evidence* of such lease. In a late case, the words “in his (the releasee’s) actual possession, now being by virtue of a lease made pursuant to the statute,” were held an insufficient recital of the lease within this statute. The lands, however, being in lease, the release was held to operate as a grant of the reversion, from the words “*demise, grant, set, and to farm let,*” notwithstanding there was a covenant in the instrument to make a *future grant*. *Doe v. Saunders*, 1 *Fox & Smith*, 18. [Now by the 7 & 8 *Vict. c. 76*, which has superseded the 4 & 5 *Vict. c. 21*, the lease for a year is rendered unnecessary, and it applies to corporations as well as to individuals, *ss. 1 & 2*. See chapter *Corporations*, and *supra*, 250.]

law, the lessee should make *an actual entry into the lands* before the release be made to him; and this [before the statute 4 & 5 Vict. c. 21, and 7 & 8 Ib. c. 76, was] done when a corporation was the grantor, as a corporation could not be seised to an use. If, however, the grantor *can* stand seised to an use, he may, to avoid the trouble of an actual entry by the grantee, make a bargain and sale, in consideration of money (though for a nominal sum only, as for 5s., which is never intended to be paid,) to the purchaser for a year: an use will then arise which the statute will immediately execute without inrolment;* and when the purchaser is thus in possession or seisin (for a bargain and sale may be made as well of a reversion or vested remainder as of an estate of freehold in possession,†) a release may be made to him.

*Bull. n. (3) to
Co. Litt. 270, a.*

* The statute is confined to bargains and sales of “estates of inheritance or freehold.” 27 Hen. 8, c. 16, s. 1.

† If an estate be limited to *A.* for five hundred years, with remainder to *B.* in fee, and *B.* makes a lease by bargain and sale to *C.* for one year to commence immediately; on a first impression the lease appears to be trivial and vain, but it is to be recollected that during that year the reversionary lessee, having an estate executed by the statute, and not merely an *interesse termini*, is entitled to the rent reserved on the term of five hundred years; and as to that term the lessee for one year is the immediate reversioner, and the proper person to take advantage of a forfeiture or merger of the prior term. *Mr. Wooddeson*, in speaking on this subject, seems to treat the lease for a year as a mere nullity. He asks, “How can a remainderman or reversioner bargain and

The proper words in the instrument on which the release is to be grounded are, if the instru-

sell the present possession, which he is not himself entitled to invade? Or how can the law supply the actual entry of the lessee, when such entry would be wrongful and illegal? If indeed there is a subsisting freehold interest, the reversion or remainder expectant thereon may very consistently be passed away by release, by force of the word ‘grant,’ which is apt and usual on these occasions.” 2 *Wood. Lect.* 303. In this passage the learned Vinerian professor is understood to object to the inapplicability of the Statute of Uses to a bargain and sale of a remainder, for that the statute deals with the possession, whereas the very characteristic of a remainder is, that it wants the possession, *ergo* the statute does not apply, and the bargain and sale for a year being simply void, the release operates as a grant of the reversion. This reasoning may not be inappropriately applied to a lease at common law, of an estate in remainder; such a lease passes only an *interesse termini*, which requires entry to perfect it, and entry cannot be made in respect of a remainder. The Statute of Uses, however, deals with the seisin—not with the possession; and, therefore, it is not technically correct to say, in the language of every release, that “by force of the statute made for transferring uses into possession;” for the statute was made for transferring the *seisin* to the use, a thing very different: and it is, moreover, observable, that the statute expressly mentions reversions and remainders as part of the subjects on which it is intended to operate, and hence it is inferred that the learned professor’s observations on this point are not so well founded as his remarks usually are.

[It is not indispensable to the operation of a release to enure by way of enlargement of estate that it should have an actual possession to work upon,—an estate vested in interest, though not in possession, is sufficient; and for this reason, a reversion

ment is intended to operate *as a lease with entry*, “*demised, leased, and to farm letten:*” if otherwise, “*bargained and sold.*”

or vested remainder may be as effectually conveyed by lease and release as an estate in possession. Thus suppose a tenant for life, with remainder or reversion to *B.* in fee, and *B.* conveys by lease and release to *C.* in fee, the bargain and sale for a year to *C.* does not create a term for one year in actual *possession*, but a term for a year actually vested in *C.*; and this estate is sufficient for the release to operate upon (*Butl. n. (3), 270, a., Co. Litt.*): the conveyance is in form a lease and release, but in effect a grant.]

If a mortgagee for a term purchase the equity of redemption [in fee,] it is usual for him to assign the term to a trustee to attend the inheritance. This should be done by an instrument bearing date two days previously to the conveyance of the equity of redemption, supposing that conveyance to be by lease and release. If the assignment bear date the day next before the day of the date of the release it becomes a question whether the term is not merged in the lease for a year which the mortgagor makes on that day to the mortgagee, who must then be supposed to have the prior term. The assignment of the term would without doubt be presumed to have been made before the lease for a year, although at law there is no fraction of a day, but every thing done in the day is considered as being done on the first moment of the day; and if it be *proved* that the assignment was executed before the release, all doubt on the subject must vanish, as there will not then have been two estates in the same person at one and the same time. But it is best to avoid the point, by dating the assignment two days prior to the date of the release. [This caution may be proper when the conveyance is made under the 7 & 8 *Vict. c. 76*, as that conveyance, it is enacted, shall take effect, as if it had been made by *lease and release.*]

CHAP. XIV.

OF A DEVISE.

2 *Bl. Comm.*
373. *Powell*
on Devises,
Touchst. c. 23.

SUCH are the principal instruments of conveyance which are amicable and not forensic, and to take effect in the maker's lifetime ; what we are now to speak of is a voluntary conveyance, but not to take effect till the maker's death. Till that time it may be altered or revoked, either expressly or by implication. It is, as the law terms it, *ambulatory* till the testator's decease. But though it does not receive its consummation till the death of the testator, yet it shall relate, as to some purposes, to the time of its being made.

[Before the recent alterations in the law of devise by the statute 1 *Vict. c.* 26, a will could not] embrace any freehold property which was not in the testator at the time of its publication. If the testator, therefore, afterwards purchased lands, or did any act which might be construed into a revocation of such will, [republishing was necessary.* But now a will made upon or after

* In *Pigott v. Waller*, 7 *Ves.* 98, it was held that a codicil referring to a will, passed after purchased lands, though the

the 1st of *January*, 1838, executed in conformity with the above statute, (unless a contrary inten-

codicil itself related to personalty only, there being a general devise of lands in the will; and in *Barnes v. Crowe*, 1 *Ves. jun.* 486, it was established, that every codicil, unless it be confined in expression, is a republication of a previous will, if such codicil be executed and attested according to the Statute of Frauds; and Lord Commissioner Eyre said, “If we disentangle ourselves from the rule, that there shall be no republication without re-execution, the principle that a codicil attested by three witnesses shall be a republication, seems intelligible and clear: the testator’s acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself, because by the nature of it, it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses.” 1 *Ves. jun.* 497. In *Guest v. Willasey*, 2 *Bing.* 429, this doctrine was acknowledged and acted on. [See also *Doe v. Evans*, 1 *Cro. & Mee.* 42.]

[The rule appears to be that a replication by a codicil duly attested merely confirms the will with its provisions, as they were effective at the date of the codicil. 2 *Russ. & Myl.* 270. 6 *Sim.* 528. *Freem. Ch. Ca.* 223. 1 *Ball & B.* 298. 4 *Ves.* 610. And a codicil duly attested is not necessarily a re-publication. *Bowes v. Bowes*, 2 *Bos. & P.* 500. *Money-penny v. Bristow*, 2 *Rus. & M.* 117. *Hughes v. Turner*, 3 *Myl. & K.* 666].

Before the statute 1 *Vict. c.* 26, if a person contracted in writing to purchase lands, and then made his will, devising the lands thus purchased to *A. B.*, and afterwards received a simple conveyance to himself in fee, this conveyance was no revocation of the prior will in *equity*, where the devisor’s heir was held to be a trustee of the legal estate (which descended

Sec. 24.

tion be apparent) passes after acquired real estate : the will taking effect as if executed imme-

to him) for the devisee *A. B.* ; but if the conveyance was taken to the common uses to bar dower, it was a revocation of the appointor's prior will in consequence of the modification and alteration of estate which ensued upon the introduction of a power of appointment and the interposition of a trustee. *Rawlins v. Burgis*, 2 *Ves. & Bea.* 382. *Ward v. Moore*, 4 *Madd.* 368. [*Bullin v. Fletcher*, 1 *Keen*, 369. But the law is now altered in reference to wills made upon or after the 1st *January*, 1838, by that statute, sections 23 and 24.]

It is a rule in a Court of equity to treat that as done which has been agreed to be done. Hence when one person agrees to sell an estate to another, the vendor is considered as having transferred the estate to the purchaser, and the purchaser as having paid the money to the vendor. The consequence is, that the vendor becomes seised of the legal estate in trust for the purchaser ; and if he dies before he has conveyed the legal estate pursuant to the contract, it will descend on his heir or devisee, in trust nevertheless for the purchaser ; but the purchase-money will belong to the vendor's executor or administrator, as part of his personal estate. The contract for sale is a revocation of the devise in equity, but not at law, and therefore the concurrence of the vendor's heir or devisee will be necessary to complete the title. If the purchaser dies before he has paid the money and taken a conveyance, the price must be answered out of his personal assets, and the estate conveyed to his heir or devisee. The purchaser may devise the estate after contract ; and a subsequent conveyance will not, as above noted, revoke that devise, unless it make a new modification of the ownership, [and the will is made before the 1st *January*, 1838 ; in which case] the will cannot operate on the *legal* estate, unless republished after the conveyance, and the legal estate will descend to the purchaser's heir, who will become a trustee for his devisee. *Broome v.*

diately before the testator's death; and a residuary devise carries all real estate not effectually disposed of, by reason of lapse, by the death of the devisee, or the invalidity of the disposition.] Sec. 25.

The same strictness of expression is not of necessity in wills as in deeds, with respect to limitations, &c.; but, in the making of wills, too much care cannot be taken in pursuing those descriptions which the law has given, and in using technical terms in a technical sense.

A devise of freehold lands* need not be under

Statute of
Frauds, 29
Car. 2, c. 3.

Monk, 10 *Ves.* 597. 2 *P. Wms.* 332, 623. *Seton v. Slade*, 7 *Ves.* 274. *Gaskarth v. Lowther*, 12 *Ves.* 107. [But by a will made upon or after the above day in conformity with the late statute the legal estate would pass, if the conveyance be executed in the testator's lifetime; *ss.* 23, 24.]

Before that statute it had] been long settled that a surrender of a lease for lives, and the taking a new lease, operated as a revocation of a prior devise of it. For the testator, by the surrender, divested himself of his whole estate in the old lease, and by the renewal acquired a new interest. *Marwood v. Turner*, 3 *P. Wms.* 163. *Slatter v. Noton*, 16 *Ves.* 197. *James v. Dean*, 11 *Ib.* 383. [But by the late act a will within its operation passes the subsequently acquired lease, the will speaking as if executed immediately before the testator's death; *s.* 24.]

* The trust of a term for years attendant on the inheritance is considered as part of the inheritance, not as a chattel real, and under the old law could be disposed of only by a will attested by three witnesses. [Thus *A.*, possessed of a term of 500 years in *Black Acre*, afterwards purchased the fee

seal as a deed, but must be in writing, and signed by the party devising, or some other person in his presence, and by his express directions, [and if made before the 1st of *January*, 1838,] attested and subscribed, in the presence of a devisor, by three or four credible witnesses.*

simple in the name of a trustee, and devised the land by a will not duly attested according to the statute; it was decided, that although the will was sufficient to pass a term in gross, yet it should not pass the trust of the term attendant on the inheritance, nor consequently the term itself. *Whitechurch v. Whitechurch*, 2 P. Wms. 236.]

* A devise [in a will made before the 1st day of *January*, 1838], must also be *published*; that is, the devisor must do some act from which it can be concluded that he intended the instrument to operate as a will or devise. *Lord Hardwicke* has mentioned a case (3 *Ath.* 161,) where upon a trial at bar in the Court of King's Bench the question was, whether the testator had *published* his will, notwithstanding it was apparent on the face of the will that it was executed in the presence of three witnesses and attested by them in the presence of the testator. This shows that publication was in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. The words "signed and *published* by the said *A. B.* as and for his last will and testament," were a sufficient publication; and the delivery of a will, as a deed, has also been held to be a publication of it. *Peate v. Ongley*, 1 Com. R. 197. *Trimmer v. Jackson*, 4 *Burn's Eccl. Law*, 119. [*Ward v. Swift*, 1 *Crom. & Mee.* 171.]

A will of freehold lands need not be *proved* in the Ecclesiastical Court. The *probate* cannot be given in evidence in any other Court; the original will must be produced, which

[But now by the above statute, every species of testamentary disposition of any kind of property made upon or after the above day must be in writing signed at the foot or end thereof by

Mode of
execution.

may be obtained by application to the Court of Chancery for an order to the Ecclesiastical Court to have the will delivered, 1 *Ath.* 627. 4 *Bro. C. C.* 476. *Cro. Car.* 395-397. 4 *Burn's Eccl. Law*, 195. But wills of chattels real and terms for years, which vest in the executors, require proof in the Ecclesiastical Court having jurisdiction where the lands lie. Whether a trust term for years is *bona notabilia* in the trustee, is a point not yet definitively settled. [See some opinions on this subject in *Points on Conveyancing*, 132, ed. 1829.]

A will may also be proved *per testes* in the Court of Chancery, if there be any doubt of the sanity of the testator, by which means the validity of the will is at once decided on without an issue at law. Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in this way against the heir; but now this practice is almost wholly abandoned, and it seems clear that a Court of equity will not compel a vendor, at the suit of a purchaser, to prove a recent will *per testes*. *Fearne, Post. Wks.* 234. *Colton v. Wilson*, 3 *P. Wms.* 190. *Sug. V. & P.* 369, 9th ed.

[No person under the age of twenty-one years can make a will under the late statute 1 *Vict. c.* 26, s. 7, neither is the will of any married woman valid except such as she might have made before the passing of the act, s. 8.

The above statute leaves the law respecting wills by soldiers in actual service and mariners at sea, as before; and does not affect the provisions of the 11 *G.* 4, & 1 *W.* 4, c. 20, respecting wills of petty officers, and seamen, and marines.

In the case of a will of a blind person there must be a clear knowledge of the contents of the instrument; but it is not

the testator, having attained the age of twenty-one years (*s.* 7), or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the tes-

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necessary to produce evidence of the identical paper, which the testator signed, having been read. *Edwards v. Fincham*, 7 *Jurist*, 25. 3 *Curt.* 63.]

Construction of Devises.

The following words in wills have been adjudged to give an estate in fee simple to the devisee :—

Fee simple.

To “*A.* for ever.” *Cro. Car.* 129. 1 *Bro. Ch. Ca.* 147.

To “*A.* and his assigns for ever.” But to “*A.* and his assigns” gives only a life estate. *Co. Litt.* 9, b. But see *Perkins*, *s.* 557.

To “*A.* and his blood.” 1 *Roll. Abr.* 834. But to “*A.* and his seed” gives an estate tail only. *Co. Litt.* 9, b.

To “*A.* and his house.” *Dy.* 333, b. 17 *Ves.* 261.

To “*A.* and his stock.” *Hob.* 33.

To “*A.* and his posterity.” 1 *H. Black.* 461. *Freem. Ch. Ca.* 268. [2 *Equity Cases*, *Abr.* 290, pl. 7.]

To “*A.* and his family.” 17 *Ves.* 261.

To “*A.* for life, and after to my family,”—the testator’s heir will take the fee under the word *family*. 1 *Turn. & Russ.* 143.

To “*A.*’s family,” or to “*A.* for life, and afterwards to his family,” will perhaps give *A.* the fee. *Hob.* 33. 5 *Ves.* 167. 3 *East*, 172. [5 *Maul. & Sel.* 126.] 17 *Ves.* 261. 1 *Turn.* 143.

To “a woman and her heirs, so that it shall remain in the family;”—doubtful whether in fee or in tail. *Semb.*

To “*W.*, to be kept in the name and family of *W.* as long as can be,”—held to pass an estate of inheritance; but whether in fee or in tail was not decided. 1 *Barn. & Ald.* 518.

tator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe* the will in the presence of the testator, but no other form of

[To the younger branches of the family of *B.* and their WILLS. heirs as tenants in common, and for default of such issue; to the elder branches of the family of *B.* (in the same words) was held void for uncertainty. *Doe v. Fleming*, 2 *Cr.*, *M. & R.* 638. See also *Robinson v. Waddelow*, 8 *Sim.* 134. *Doe v. Joinville*, 3 *East*, 172.]

To "*A.* of the land of my house."—*Semb.*; though *land* alone will not pass the fee, 1 *Ves. jun.* 78; much less "goods, lands, and chattels," *Pr. Ch.* 471. But where a testator "constituted *R. G.* sole executor of his land for ever," the fee was held to pass, 5 *Barn. & Ald.* 785.

To "*A.* and his heir." 1 *Roll. Abr.* 832. *Skin.* 563. 1 *Vent.* 215. But a devise to "*A.* and his next heir male," or to him "and the heir of his body for ever," will give an estate tail. *Amb.* 454. *Sty.* 249. *Com.* 289.

To "*A.* and heirs," without adding *his*. *Co. Litt.* 8, b. 4 *T. R.* 39.

To "*A.* or his heirs." 2 *Atk.* 645. *Plowd.* 286, 289.

To "*A.* and his heirs, *during their lives*,"—the words in italics being considered as repugnant and void. 12 *East*, 515.

To "*A.* and his heirs; but if he die without heirs, to *B.* in fee." *A.* takes an estate in fee, if *B.* be a stranger

[* It has been decided that the attestation of a witness who cannot write, but whose hand is guided by the other witness, is a subscribing, under the statute 1 *Vict. c.* 26. *Harrison v. Elvin*, 3 *Ad. & Ell. N. S.* 117].

attestation shall be necessary, (s. 9): the same form of execution is required to render valid any alteration in the will (s. 21).

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to him: but if *B.* be of his blood, or if *A.* be a denizen or a bastard, he will take an estate tail. (*Semb.*) [*Pickering v. Towers*, 1 *Eden*, 142.]

To "*A.* in fee simple." *Perk. s.* 557. *Gilb. Dev.* 18. Of "the fee simple to *A.*, and after his death to *B.*" *A.* has the reversion in fee. *Dy.* 357. 1 *And.* 51.

To "*A.* to hold to him and *his.*" *Benl.* 11, pl. 9.

"To be *hers* at my decease." But *qu.* if more than an estate for life will pass by this devise, the words pointing to *time* and not to *interest*.

To "*A.* and his executors." 3 *Burr.* 1881—1885. 5 *Ves.* 403. *Fearne, Post. Wks.* 144. But *qu.* if these words pass a fee, "and I appoint *A.* my executor of all my real and personal estate not hereinbefore disposed of." See and consider 5 *Barn. & Ald.* 785.

[After an absolute bequest of personal estate to his wife, her heirs, and assigns, the testator added, "and I do likewise make my wife my full and sole executrix of my freehold house in *A.*" *Doe v. Haslewood*, 1 *Nev. & P.* 352, see also *Doe v. Pratt*, *ib.* 366.

To "*A.* for life, and after to his next of kin," *i. e.* his heir. *Semb. et vid.* 5 *Ves.* 403. [*Sed qu.* 15 *Ves.* 532.]

To "*A.* and his legal representatives." *Semb., et vid.* 3 *Bro. C. C.* 224. 1 *Cox*, 250.

To "*A.* and his successors." 3 *Bulst.* 194. *Moore*, 853. [1 *Roll. Rep.* 398.]

"I make *A.* my sole *aire* and *executory.*" *T. Jones*, 25.

To "*A.* to dispose and employ the same on her and her son at her will and pleasure." *Moore*, 57. *Benl.* 11, pl. 9.

To "*A.* for her own use, to give away at her death to

[It has been decided that the witnesses must either see the testator sign, or he must actually acknowledge his signature to them.*]

whom she pleases," 2 *Atk.* 103; "or to dispose of the same as she will." 1 *Leon.* 283. WILLS.

[To "*A.* (the testator's heir at law) for life, to be enjoyed by her without molestation, and after her death without issue, that she shall dispose thereof at her will and pleasure:"—she having no issue, was held to take the fee. 2 *Wils.* 6.]

But to "*A.* for life, and after her death to *leave* the same to whom she pleases," gives only a life-interest with a power of [testamentary] appointment. 10 *East*, 438. 10 *Ves.* 370. See also 1 *Sugd. Pow.* 119, &c. ed. 6.]

To "*A.* for life, and if he should not live to *spend* it, to *B.* in fee." *A.* takes in fee with an executory devise over. *Semb.*

To "*A.* and to his, to do what he will with it." *Latch.* 9, 36.

To "*A.* to do therewith [or to dispose thereof] at his will and pleasure." 6 *Mod.* 111. 1 *Leon.* 283.

To "*A.* to give, sell, or do therewith at his pleasure." 1 *Leon.* 156. 2 *Wils.* 6.

[* This was decided in the important case of *Hudson v. Parker*, 8 *Jurist*, 786, by *Dr. Lushington*, (sitting for *Sir Herbert Jenner Fust*,) in which case the two witnesses subscribed a paper, at the request and in the presence of a party who told them it was his will, but they did not see him sign it, nor did he acknowledge any signature, the writing on the paper being concealed from them. The learned judge, in his able decision against the will, expressed his opinion that the authorities under the Statute of Frauds, bearing upon the case before him, were not to be followed in the construction of the statute 1 *Vict. c.* 26].

Publication. But publication is now no longer necessary.

Witnesses. The incompetency of a witness to the will at or after the execution does not invalidate his

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To "*A.* to dispose of for payment of all my just debts."

1 *Ch. Ca.* 196.

To "*A.* to be at his discretion." 1 *Leon.* 156.

To "*A.* to give to his children," or "to make provision for his children." 6 *Mod.* 110, 111.

To "my wife, to be divided and disposed of to my children;"—the wife takes a fee from the word *dispose*. *W. Kely.* 6. [4 *Beav.* 174, 177.]

"To be equally *divided*," does not mean to be equally divided in fee. *Cro. Eliz.* 330. 1 *Roll. Abr.* 834. pl. 13, [and see 1 *Vern.* 65.]

"To "*A.* freely to be enjoyed." *Cowp.* 352.—*Contrà*, 11 *East*, 220, where the words "freely to be possessed and enjoyed" were held to mean free from incumbrances.

Of "all the residue of my real estate." *Pr. Ch.* 264.

3 *P. Wms.* 295. 2 *T. R.* 659. 1 *Ves.* 10. 1 *Wils.* 333. 2 *Ld. Raym.* 1324.

Of "all the rest and residue of my estate." 4 *Mod.* 90.

3 *Ib.* 228. 2 *Vern.* 564.

Of "whatsoever else I have not disposed of." 1 *Salk.* 239. *Com. R.* 164.

Of "all my lands not before devised." 2 *Vern.* 461.

But a devise of "my manor of *S.* and all my lands in *N.*" will not carry a fee. 1 *Price*, 353.

Of "all my concerns." *Ca. temp. Talb.* 286.

Of "all I am worth." 1 *Bro. C. C.* 437.

Of "all my wordly substance." *Cowp.* 306.

Of "all my real *property*." 18 *Ves.* 193. 14 *East*, 370. *Ibid.* 221. [6 *Bar. & Cress.* 512.]

attestation, (s. 14) ; and the gift of any estate or interest in real or personal estate, (except a charge for payment of debts) to an attesting witness, his or her wife or husband is void, (s. 15). But a

That "all my children shall share equally in all my WILLS. property." 1 *Jac. & W.* 189.

Of "all my estate real and personal." 18 *Ves.* 193.
11 *East*, 518.

Of "all my personal estate," the intention being clear.
11 *East*, 246.

Of "all that I am possessed of in the parish of *A.* consisting, &c." *Semb.* [8 *Ves.* 604.]

[A residuary disposition of goods, &c. "and every thing else I die possessed of," coupled with introductory words expressing an intention to pass all worldly property. *Wilce v. Wilce*, 7 *Bing.* 664. *Davenport v. Coltman*, 9 *Mee. & Wel.* 481.]

Of "all my property both personal and real for ever."
11 *East*, 518. 14 *Ib.* 370. 16 *Ib.* 221.

Of "all my property whatever and wheresoever." 2 *New Rep.* 214.

[But the word *property*, used merely in reference to local situation, does not pass the fee. *Doe v. Clarke*, 1 *Cro. & Mee.* 39.]

Of "all my right in *B.*" 1 *Ld. Raym.* 187.

Of "all my interest in the estates of *A.*" 5 *T. R.* 295.
2 *Doug.* 763.

Of "all my right, title, and interest." 3 *Bro. P. C.* 7,
Tom. ed.

Of "all my lands, tenements, and *hereditaments.*" *Per Holt*, C. J. 11 *Mod.* 90, 102. 2 *Salk.* 685. *Holt*, 235. 3 *Wils.* 418. But now held otherwise. 3 *T. R.* 356. 5 *Ib.* 558. 6 *Ib.* 175. 1 *Salk.* 239. *Mos.* 242. Nor will "hereditaments" alone give the fee. 1 *Bos. & Pull.* 558. 2 *Ib.* 247. 3 *Anst.* 781.

creditor may be admitted as a witness, (s. 16);
as also an executor, (s. 17.)

Revocation.

A will under the above act is revoked by mar-

WILLS.

To “*A.* for life, and after her decease I devise all my lands, tenements, and hereditaments, not disposed of, to *B.*,” he takes the fee. 2 *Vent.* 285. *Carth.* 50. But “all my lands, freehold, copyhold, and leasehold, in the county of *Essex*,” give an estate for life only. 8 *T. R.* 67. 1 *Price*, 353.

Of “my inheritance in *W.*,” or “my inheritance therein;” or to three persons “as trustees of inheritance for the execution of my will.” *Moore*, 873. *Hob.* 2.

Of “all my goods, chattels, and personal estate, together with my real estate.” 3 *Atk.* 486. 1 *Ves.* 10.

Of “all my estate and effects:” but this depends on the context and intention. 9 *Ves.* 143. 1 *Per. & Dav.* 472.

Of “the residue of my estate and effects to trustees, and out of such residue to manage my farm.” 5 *Barn. & Ald.* 18.

Of “all the residue and remainder of my effects, both real and personal;” *Cowp.* 299. 3 *Bro. P. C.* 388, *Tom.* ed. But “all my effects” will not include real estate, except the intention be very manifest; nor will “all the rest, residue, and remainder of my effects wheresoever and whatsoever, and of what nature, kind, or quality soever;” nor will “all the rest and residue of my goods and chattels, personal and testamentary effects whatsoever.” 3 *East*, 516. 1 *East*, 33. 11 *East*, 290. 15 *East*, 394. 2 *Maule & Selw.* 448. 3 *Brod. & Bing.* 85.

Of “all that my remainder.” *Lutw.* fol. 764. 1 *Ld. Raym.* 187.

riage, unless the will be an appointment of real or personal estate, which, if not so appointed, would not devolve upon the donee's real or personal representative, or be distributable under

Of "all that my reversion." 2 *Ves.* 48.—*Contrà*, WILLS.
1 *Vern.* 65.

"*A. B.* to enjoy all that remains to me after payment of the above sums." *Semb.*

Of "all other my part, share, and interest, of and in the estates late of the said *A. B.*" 5 *T. R.* 292.

Of "all that my *share* of the *Bastile* and other estates situate at *A.*" 5 *Maule & Selw.* 408.

Of "all that my half part" by one tenant in common in fee to his companion. *Semb.* 11 *East*, 160. But the word *share* alone in a substitution clause will not pass a fee. *Skin.* 339. 2 *Vern.* 388. 8 *Vin.* 344.

To "trustees in fee in trust for *A.*" without more, *A.* takes an equitable estate in fee. 8 *T. R.* 597.

To "daughters equally, if one die before the other, then one to be heir to the other." 1 *Roll. Abr.* 833.

To "*A.* in fee, to *B.* to hold in the same manner." *Co. Litt.* 9, b. See also 20, b. [9 *East*, 400.] 2 *Bac. Abr.* 534. But under a devise to "sons in tail, remainder to daughters as tenants in common," the daughters will take for life only. 1 *Bro. C. C.* 240. [3 *T. R.* 83. *S. C.* See also 5 *Barn. & Ald.* 465, 473.]

Of "all my estate to such uses as *A.* shall appoint." 3 *Ves.* 470.

Of "all my *temporal* estate." 3 *P. Wms.* 294. *Ca. temp. Talb.* 284.

Of "all my *testamentary* estate." 2 *H. Black.* 444. 3 *Brod. & Bing.* 85. [2 *Sim.* 264.]

Of "*all* to my grandchildren." *Semb.* But see 1 *Swan.* 201.

Of "all that my *estate.*" 2 *Lev.* 91. 6 *Mod.* 106.

the Statute of Distribution among his next of kin, (s. 18).

It may also be revoked by another will, by

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9 *Ves.* 137. 7 *East*, 259. 1 *T. R.* 411. 2 *Ves.* 48.

2 *T. R.* 659. 2 *Show.* 328. 1 *Ves.* 228.

Of "all that estate I bought of *Mead*." 2 *Ves.* 48.

Of "all my estate at *S.*," or "in *T.*," or "of *A.*" or

"all my *A.* estate." *Ca. temp. Talb.* 157. 4 *Taunt.*

176. 6 *Ib.* 317, 410. 8 *East*, 141. 2 *T. R.* 656.

1 *Bos. & Pul.* 243. *Loft*, 224. 7 *Taunt.* 35. 4

Maule & Selw. 366. 5 *Ib.* 408. 2 *Eden*, 115. 1

New Rep. 335. 3 *Barn. & Cress.* 870. But devises

"of an estate in the occupation of *A.*" or "lying in

B." or "situate at *S.*," or "called or known by the

name of *C.*," have been held to pass estates for life

only. 3 *Ves.* & *B.* 160. *Doe v. Lawes*, 7 *Ad. & El.*

195. *Doe v. Lean*, 1 *Ib. N. S.* 229. The inclination

of the Courts, however, seems to be to allow the word

estate its full force, if it be not accompanied with the

very words which have been held to confine its mean-

ing to locality. Thus, a devise of "all my freehold

estate, consisting of thirty acres, situate at *S.*, now in

the occupation of *G.*," has been held to carry the fee.

1 *Brod. & Bing.* 72. 3 *J. B. Moore*, 565, against

7 *Ves.* 546. 7 *East*, 259. And see 2 *Marsh.* 117.

6 *Taunt.* 410. So a devise "of all my estate real

and personal, that is to say, my land situate at *S.* on

my estate," has been held to carry the fee. 7 *Taunt.*

35. *Et vide* 2 *Bing.* 456, as to the words "now in

my occupation." [*Esdaile v. Gall*, 1 *Russ. & M.* 540.

Contrà, *S. C.* 8 *Bing.* 323.]

To "*A.*, but if he dies under twenty-one. to *B.* in fee."

or "to his own heir." *A.* attaining twenty-one, takes

codicil or other testamentary writing executed as above mentioned ; or by cancelling or other destruction by the testator, or by some person in his presence, and by his direction, with the in-

the fee. 2 *Saund.* 388. 3 *Burr.* 1618. 9 *East*, 400. WILLS.
[6 *Price*, 179, 184. See also 1 *Barn. & Cress.* 336.]

“In case my daughter shall die under twenty-one, unmarried *and* without issue.” If the daughter had attained twenty-one she would have taken the fee ; but she dying under twenty-one, a married woman without issue, it was held that the testator’s heir was entitled. 2 *Barn. & Ald.* 441.

“Of all my real and personal estate to executors in trust for *A.* till twenty-one, then the trust to cease.” *A.* takes in fee. 1 *Eden*, 479. *Amb.* 387. 2 *P. Wms.* 194. [See also *Doe v. Ewart*, 7 *Adol. & Ell.* 636, 663, and *Stephens v. Frost*, 2 *Yo. & Col.* 302.]

So also a devise of real estate to trustees in trust to convey and assure the same estate to *A.*, when and as soon as he shall attain the age of twenty-one years ; but if he should die under that age, without leaving lawful issue, then over ; *A.* takes a vested fee, subject to be divested on the event contemplated. *Phipps v. Akers*, 5 *Sim.* 44. 3 *Cl. & Fin.* 665, 702, confirmed *D. P. Jurist*, 1842, 745. See also *Edwards v. Hammond*, 3 *Lev.* 132. *Bromfield v. Crowder*, 1 *New Rep.* 373. *Doe v. Moore*, 13 *East*, 601.]

To “*A.*, on condition that he pay 20*l.* to *B.*” *Co. Litt.* 9, b. 8 *T. R.* 2.

[To “*A.*, for paying his son *B.* 50*l.*, when of the age of twenty-one.” 3 *Russ.* 350.]

To “*A.*, on condition that he release *B.*’s debt.” 1 *And* 35. 2 *Ib.* 13.

tention of revoking, (*s.* 20). But no will is revoked by any presumption of an intention, on the ground of an alteration in circumstances, (*s.* 19), nor by any conveyance or act subsequent

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To “*A.*, on condition that he allow *B.* a maintenance.”
T. Jones, 107. *Pollexf.* 545.

To “*A.*, he paying my just debts and legacies,” or
“charged” or “subject” to such payment, or to
“*A.*, my legacies being first paid.” 2 *Vern.* 687.
2 *Show.* 36. 3 *T. R.* 356. 8 *Ib.* 1. 4 *East*, 496.
5 *Ib.* 87.

To “*A.*, but he to allow my son to have a living in the
house.” *Semb.* [2 *Show.* 49.]

To “*A.*, on condition that he pay a legacy of 120*l.* to
B. six months after my decease,” where the estate is
of the annual value of 10*l.* 2 *Lev.* 249. *T. Jo.*
113. But *A.* would take for life only, if the legacy
do not exceed the first year’s rent; for as legacies are
not payable till twelve months after the testator’s
death, the devisee could not possibly sustain a loss
by taking a life estate and making the payment.
If, however, the legacy be directed to be paid imme-
diately, he will take the fee. 8 *East*, 141. 2 *New*
Rep. 343. 3 *Maule & Selw.* 516, 518.

To “*A.*, upon condition of his paying 30*s.* annually,”
whatever the rent. 2 *Show.* 49. 2 *W. Black.* 1041.
5 *T. R.* 13, 292. 3 *Burr.* 1533.

To “trustees of my freehold, copyhold, and all my
personal estate, after payment of certain legacies and
annuities.” 2 *Barn. & Cress.* 357.

[Power of sale
in executor or
heir.]

[When a testator does not devise his real estate to his
executors, but merely “desires that it shall be con-
verted into money,” directing the produce to be applied
by his executors, a power of sale is *implied* in the

to the execution of the will relating to any real or personal estate therein comprised : but the will shall operate upon such part of the estate as the testator has power to dispose of by his will,

executors, and they may *convey* the fee without the concurrence of the testator's heir at law. 2 *Sim. & Stu.* 238. 4 *Mad.* 142. But where the power is neither expressly, nor by implication, given to the executors, the heir at law is a necessary party, where the estate descends upon him, and he is a trustee for that purpose. 1 *Lev.* 304. 4 *Mad.* 44. 1 *Jac. & Walk.* 189, 193. *Harg.* note, *Co. Litt.* 113, a. 1 *Sugd. Pow.* 128—152, ed. 6, *infra*, ch. *Powers*. WILLS.

Where no power is expressly or by implication given to the executors, and the estate does not devolve upon the heir, but passes by the will to devisees who are minors, no sale can be made until they are of age. 1 *Jac. & Walk.* 189.]

To “*A. B.* and *C. D.* in trust to pay the rents to testator's nieces.” The legal estate in fee will pass to the trustees. 2 *Brod. & Bing.* 623. [See also 2 *B. & Adol.* 554. 7 *Adol. & Ell.* 636. 4 *Mee. & Wel.* 421.] [Devise to trustees.]

[By the 30th sect. of the stat. 1 *Vict. c.* 26, (applicable to wills made on or after the 1st day of *January*, 1838) it is enacted, that where any real estate (not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate which the testator has power to dispose of, unless a definite term of years absolute or determinable, or an estate of freehold, shall be thereby expressly given. By the following section (31) it is provided, that where any real estate shall be devised to a trustee without ex-

at the time of his death, (s. 23). No will revoked shall be revived, unless by a re-execution, or by a codicil, or other testamentary writing, executed as above-mentioned, expressing an in-

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press limitation of the estate to be taken by the trustee, and the beneficial interest shall not be given to any person for life, or, if given for life, the purposes of the trust may continue beyond the life of such person, the trustee shall take the fee or other whole estate of the testator, and not an estate determinable when the purposes of the trust shall be satisfied.

[Express
estate tail.]

The following expressions in a will of real estate have been held to give *express* estates tail:—

To “*A.* and her heirs lawfully begotten.” *Co. Litt.* 20, b.
7 *Taunt.* 85.

To “*A.* and his heirs male.” *Co. Litt.* 20, b.

To “*A.* and his issue.” 1 *Mad.* 467, 475; issue male,
19 *Ves.* 545. S. C. 1 *Mer.* 20.

To “*A.* and his issue living at his death.” 1 *Eden*, 473.

To “*A.* and his seed.” *Co. Litt.* 9, b.

To “*A.* for life, and after his decease to the heirs or heirs male of his body.” 1 *Ves. sen.* 133. 19 *Ves.* 73.
2 *Sim. & Stu.* 409; 3 *Mer.* 176. 182; or “to his issue,” 4 *T. R.* 82. 1 *East*, 229.

To “*A.* for life, &c., to trustees, &c., to preserve and after the death of *A.* to the heirs (general or special) of his body.” 19 *Ves.* 574. S. C. 1 *Mer.* 271.
11 *East*, 548.

To “*A.* for life and no longer, and to such son as he shall have, and in default of such issue, remainder over.” 2 *Ves.* 225. 1 *Burr.* 38.

To “the children of *A.* and their issue, share and share alike.” 4 *Russ.* 70.

To “*A.* and his children,” (he having none at the time

tention to revive the same : and when a will or codicil partly revoked, and afterwards wholly revoked shall be revived, the revival, in the absence of a contrary intention, shall only extend

of the devise)." 6 *Rep.* 17. 1 *Bulstr.* 219. *Benl.* 30. WILLS.
Doug. 321. 2 *Bos. & Pul.* 485. And in an obscure will, where there were children at the time of the devise, the word "children" was construed a word of limitation, the devise being "to *A.*'s. children, to be equally divided between them, share and share alike, and to the survivor of them and their children." 16 *East*, 399. [See also *Broadhurst v. Morris*, 2 *B. & Adol.* 1.]

The following expressions have been held to give estates tail *by implication* :— [Estate tail by implication.]

To "*A.* generally, or to *A.* for life, and if he die without heirs or issue (general or special)." 1 *Roll. Ab.* 837. 1 *Burr.* 38. 3 *Ves.* 99. 15 *Ves.* 564. 1 *Russ.* 262. 4 *Ib.* 283. 2 *Sim.* 233.

To "*A.*, and if he die and leave no child lawfully begotten." 5 *Bing.* 243. [4 *Bar. & Adol.* 43.]

[To "*A.* for life, and after his decease, to his children, and so on for ever ; and for want of children, over." *Trash v. Wood*, 4 *Myl. & Cr.* 324. See also *Wood v. Baron*, 1 *East*, 259.]

To "*A.* for her maintenance, and after her death without issue." *Freem. Ch. R.* 40.

"I make *A.* my sole heir, and if she die without issue." 2 *Atk.* 307.

To "*A.* and if he has no heirs, then over to his sister," or other collateral heir, the word *heirs* must be construed heirs of the body. *Cro. Jac.* 427. *Amb.* 398, 478.

"To the three daughters of *A.*, to be equally divided,

to the part unrevoked and subsisting previously to the total revocation, (s. 22).

The will speaks as if executed at the death of the testator (s. 24); and a residuary disposition

and if any of them died before the other, then the others to be her heirs, equally to be divided; and if her three children die without issue." *Cro. Jac.* 448.

To "*A.* and his heirs; and if he dies without issue (general or special)." *Cro. Jac.* 290, 695. 7 *T. R.* 276. 17 *Ves.* 479. 7 *Adol. & Ell.* 636.

[But in wills made on or after the 1st of *January*, 1838, the rule of construction is now materially altered by the statute 1 *Vict. c.* 26, s. 29, in respect of devises and bequests of real and personal estate similar to those above cited, as giving estates tail by implication; for the act prescribes that where the expressions, "die without issue," or "die without leaving issue," or "have no issue," or any other words occur which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, they shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will: so that, as observed on a former page, the first devisee does not take an estate tail, but an executory devise defeasible on the devisee dying without issue living at his death. The words of section 29 are given in a former page, 211, 212.

We may here observe, that in wills made before the 1st of *January* 1838, where chattels, real or personal, are bequeathed by words which in devises of real estates would expressly or by implication give the devisee an estate tail, then the legatee shall take an absolute interest in such personal estate, and the bequests over will be void. See this

comprehends all property real and personal, eventually undisposed of, by reason of lapse, or the invalidity of the devise or bequest ; thus assimilating the law as it respects real and personal estate, (s. 25).

A general devise of land includes copyhold and leasehold, as well as freehold (s. 26), and all estates, both real and personal, over which the testator has a general power of appointment, unless a contrary intention appear.

The act then prescribes some important rules

subject discussed in *Roper's Legacies*, vol. ii. ch. 22, p. 445, ed. 1838.

We conclude the present note with observing, that where there are no expressions in the will, made before the above day giving in direct terms, or by implication an estate of inheritance, the devisee will take only for life ; as to "A." generally, or to "A. and his assigns." *Co. Litt.* 9, b ; or to "A. and his children," (he having children living at the time of the devise.) 6 *Rep.* 17. *Vin. Abr.* tit. *Dev.* (R. a.) *Cowp.* 657. *Doug.* 759. 19 *Ves.* 299. 5 *Barn. & Ald.* 464. 3 *Bro. & Bing.* 27. 4 *Russ.* 283. [3 *B. & Adol.* 469. *Graves v. Hicks*, 5 *Adol. & Ellis*, 38. *Doe v. Eve*, *Ib.* 317. *Silvery v. Howard*, 5 *H.* 253, or to "A. and after her decease to her children," *Knocker v. Bunbury*, 6 *Bing N. S.* 306. But by the 28th section of the above act in wills made on or after the above day, the devise of real estate without words of limitation, shall be construed to pass the fee simple, or other whole estate or interest of which the testator has power to dispose, unless a contrary intention appear by the will.]

[Estates for life.]

of construction which are referred to in the notes on this chapter.

The 32nd section enacts, That the devise to a person for an estate tail shall not lapse by the death of the donee in tail in the testator's lifetime, if he leave issue inheritable under the entail.

By the 33rd section, a similar provision is made in favour of gifts to children or other issue of the testator who leave issue living at the testator's death.

The following are the words of the clause :
' Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such* issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the testator's death, unless a contrary intention appear.

[* If a legacy should be given to *A.*, the child of the testator, and *A.* dies in the testator's lifetime leaving issue *B.*, who also dies in the testator's lifetime leaving issue *C.*, born after *A.*'s death, but who survives the testator, *C.* will not be entitled, not being issue of *A.* living at *A.*'s death.]

Upon the last section it has been decided that Johnson v. J.,
3 Hare, 157.
8 Jur. 77. the legacy vests in the deceased legatee, and becomes subject to all the incidents of property belonging to him, in the same manner as if he had survived the testator ; and, consequently, that it is subject to payment of his debts, to the dispositions of his will, or, if he dies intestate, to distribution of his effects under the statute ; and that, although the existence of issue might be the *motive* for this provision by the Legislature, the issue were not the *object* of it.

It has also been determined that this section Griffiths v.
Gale, 12 Sim.
354. does not apply to a child, to whom a share of a fund is given by the testamentary *appointment* of a parent under a power of selection, and which child dies in the lifetime of the donee of the power. The language of the judgment would seem to apply to all testamentary appointments whatever ; but it may be submitted, whether the thirty-third section, coupled with the first, does not apply to testamentary appointments under *general* powers, which give the donee an absolute control over the property ; and, especially, where, in default of appointment, the property is given over absolutely to the donee.]

CHAP. XV.

OF A FINE.*

2 Bl. Comm.
348. Co. Litt.
121, a.

A FINE [now abolished as to lands in *England* by the stat. 3 & 4 W. 4, c. 74, from the 31st

* [There were three sorts of fines in general use; first, the fine *sur conusance de droit come ceo*, &c.; secondly, the fine *sur conusance de droit tantum*; and thirdly, the fine *sur concessit*: the fine *sur don grant et render* was considered obsolete. The fine *sur con. de droit come ceo*, &c, was most usually adopted, and, indeed, from its peculiar force and efficacy, was preferable in all cases where a forfeiture was not apprehended, or would not be incurred by levying it. Forfeiture ensued where a mere tenant for life levied or accepted this fine. *Co. Litt.* 251, b; and where a person had merely a right of action or of entry, or a contingent remainder, or other executory interest, which did not give a vested estate, and levied this fine, extinguishment took place. This first species of fine is more especially the subject of discussion throughout the present chapter.

The fine *sur conusance de droit tantum* was sometimes adopted where the person levying it wished only to transfer the estate or right which he actually had; and was used to transfer a remainder or reversion, or to surrender a life estate where it was important to avoid the consequences of a forfeiture. The fine *sur con. de droit tantum* was not, however, often resorted to, as the same objects might be attained by the third species of fine, the fine *sur concessit*, which was

*December, 1833, and as to lands in Ireland by the 4 & 5 W. 4, c. 92, from the 31st October, 1834, was] the compromise of a fictitious suit, and operated either by passing an interest, or by way of estoppel.**

In order to pass an interest, the cognizor or cognizee must, [at the time of levying the fine have had] an estate of *freehold* in the premises, either in possession, remainder, or reversion, or he must have been *cestui que trust*, of such an estate; for, otherwise, a person not bound by estoppel might have vacated the fine by pleading *partes finis nihil habuerunt*.† But whether the

Touchst. 13.
[2 *Sch. & Lef.*
99.]

frequently used, and was also adapted for the purpose of conveying or binding a partial estate or interest, and without incurring the risk of forfeiture. It was in use for the purpose of conveying the life estate of a married woman, or for creating terms for years which were to be binding by way of estoppel on contingent or executory interests. 1 *Prest. Con.* 200. 5 *Gru. Dig. Tit.* 35, ch. 3, s. 10—25 ed. 4.]

* Thus, although a fine levied by persons, who had no estate of freehold in the lands, was void as to strangers, yet it would operate as an estoppel against the persons who were parties to it. Thus if two were seised in fee, and a stranger levied a fine to them and to the heirs of one of them, the other would be thereby estopped from claiming any thing more than an estate for life in the lands. *Shep. Touch.* 14. As to a fine operating by estoppel when levied by an expectant heir, see *Helps v. Hereford*, *ante*, p. 229.

† If a tenant for years, wishing to acquire the fee, levied a fine, it would have been a forfeiture of his term to him in reversion, who might immediately have commenced an eject-

freehold were in the cognizor or cognizee either by right or by wrong, was of no consequence ; and hence, when a fine was to be levied in order to strengthen a title, a *feoffment* was often necessary, as the cognizor or cognizee would then, at least, have the freehold in him *by disseisin*.*

ment for recovery of the possession, and if the fine were set up against him, the plea of *partes finis* would effectually have removed it ; and although he might not have commenced his ejectment till five years after the fine, yet the non-claim would not have hindered him, as the same plea would have been available. If the reversioner allowed twenty years to elapse after the levying of the fine, he must have changed his action, but the plea would still have availed him. If, however, he slept on his title for thirty years, his remedy would have been entirely lost ; but if he died before thirty years, then his heir would have had thirty years longer to bring his real action in. See the former Statutes of Limitation, *infra*. [These Statutes of Limitation have been repealed by the statute 3 & 4 W. 4, c. 27, by which material alterations are made in the mode and limit of the remedies for the recovery of real estate ; an epitome of which will be found on a future page.]

* But if the feoffment were *fraudulent*, the fine might have been reversed. See 3 Co. 78, in *Fermor's* case, *Cowp.* 694—5, &c. 1 Burr. 117,—Note by MR. WATKINS.

In *Fermor's* case, 3 Co. 78, a lessee for years had fee-simple lands of his own in the same township where his leasehold lands were situate. He made a feoffment of the whole, and thereupon levied a fine to the use of himself in fee ; he still however continued to pay rent for the leasehold lands until five years elapsed, when he set up the fine and non-claim as a bar to his lessor. All the Judges (except two) held, that the original lessor was not barred by this fine, because of the secret and fraudulent manner in which it was

If there were no interest in the person levying the fine, none of consequence passed. The fine in that case, if it operated at all, could only operate *by conclusion or estoppel*.

levied; and it was asked, how the lessor could make his entry or bring his action when he knew not of the feoffment which did the wrong? And as the lessee had lands in fee-simple in the same town, every one would presume that the fine was levied of that whereof it might lawfully be levied. And although the fine contained in reality more acres than the lessee's own lands, yet that was usual in almost all fines; and peradventure the lessor knew not the just quantity of the lessee's own land, a knowledge which did not pertain to him; and the fraud it was said was the more odious in this case because it occurred between the lessor and lessee, between whom there was a trust and confidence. But when a disseisor (although he gains a possession by wrong) levies a fine with proclamations, it shall bind the disseisee if he permit five years to run upon it, for a disseisor *venit tanquam in arenâ*, and it is not possible but that the disseisee to whom the wrong is done and who hath lost his possession, should be conusant of it; and therefore it will be his own folly if he make not his claim in due time. *Fermor's case*, 79, b. The doctrine mentioned, *ante*, p. 298, was not meant to apply to a case similar to the above, where there is only a short term of years yielding a valuable ground or other rent, but only to cases where a person is possessed of a long term, for instance, of five hundred or one thousand years at the rent of a peppercorn, the reversion being remote and valueless. If such a lessee assigned his term to *A. B.*, and then entered and delivered seisin on a feoffment, and levied a fine to the feoffee to the use of himself in fee, and five years elapsed without his noticing or acknowledging the original lessor, and without any mention having been made in the assignment of the

Estoppel.

All *parties* to a fine, whether any interest passed or not, were concluded, as every one should be concluded by his own deliberate act.

Hob. 333.

Privies (who were also estopped,) were either privies *in estate*, as the donor and donee; *in blood*, as the heir and ancestor; or *in law*, as the lord and tenant, &c.*

[*Sugd. V. & P.*
261, ed. 6.]

intended feoffment, this seemed a clear case of bar at law, because there was no fraud as between the owner of the term and the parties to the feoffment; and it is apprehended that a Court of equity would not presume that the trustee was privy to the feoffment, merely because he held the term in trust for the feoffor. But whether the Court of Chancery will compel a purchaser to take a title, depending on a point of this kind, is a question which has not yet been decided. If there be no fraud at law, as it is assumed there is not in a case thus simply circumstanced, the bare declaration of trust in the assignment will not, it is conceived, constitute the case a fraudulent one in equity; see the case of *Reynolds v. Jones*, 2 *Sim. & Stu.* 206, *et ante*, p. 287, 288.

* If a donee in tail levied a fine in fee, with proclamations, and died without issue, and the donor or his grantee omitted to enter or claim within five years after the death of the donee, the donor was barred by force of the statute, as being privy *in estate*. If an ancestor levied a fine, and a person claiming the estate as heir could deduce his title only through that ancestor, he would be estopped by the fine as being a privy *in blood*; but if he could make his title without claiming through the person levying the fine, he would not be estopped. As if an heir in tail levied a fine in the lifetime of his ancestor, and died, leaving a son, and then the ancestor died, the grandson would be estopped by the fine as a privy in blood, for he could make out his pedigree only through the person levying

Strangers to a fine were all persons who were neither parties nor privies.

In order to bar an estate tail by fine, the privies must have been privies *in estate*: that the issue were privies in blood only was not enough. The issue, to be barred by a fine, must claim *the estate* from the person levying it, or derive his title through him. If lands, therefore, were given to *A.* and the heirs *female* of his body, and he had a son and a daughter, and the son levied a fine and died, the daughter would *not* be bound; for though she was heir to the son, and so privy *in blood* to him, yet she was *not* privy to him *in estate*, as she did not claim it from or through him. But if lands were given to *A.* in tail general, and his eldest son, in the lifetime of *A.* levied a fine, the entail would be barred on the death of *A.* *if the son survived him*; for the issue of *A.* would be privies both in blood and estate to *A.*'s eldest son.*

[*Touch. Fine*,
p. 27.]

See *Cro. Car.*
434. *Brad-*
stock v. Scovell,
& *al. Doe v.*
Jones, 1 *Crom.*
& *Jer.* 528.

the fine. But where an eldest son levied a fine of an estate which was then vested in his mother in tail, and died in her lifetime without issue, and the estate descended to his brother as next heir in tail, it was adjudged, that this fine did not bar the brother; for as the estate tail never descended to the elder brother, the younger brother was not privy to him. *Bradstock v. Scovell*, *Cro. Car.* 434, *et infra* in the text. The estoppel by privy *in law*, mentioned in the text, seems to be inapplicable to any case likely to occur at the present day.

* But the eldest son's *issue* would be barred by the fine,

1 *Fearne*, 535.

If a *contingent remainder* were limited to *A.* in tail, and before the contingency happened, he levied a fine, his issue would be barred; for though *A.* was never *seised* of an estate of freehold in the lands so entailed, yet, as whoever claimed such lands by virtue of the entail must have claimed *from him* as the first taker, they must have been privies both in blood and estate to him, and so be bound by the statute.*

although he himself should not survive his father, for his issue could only claim through the person who levied the fine, [there being privity in blood in respect of the estate tail.]

* If the owner of an estate in fee subject to an executory devise levied a fine, and five years elapsed after the event happened upon which the estate was to go over to the executory devisee, it is not settled whether such fine and non-claim would bar the executory devise. In deciding this question, it will be first necessary to consider, whether the possession of the tenant in fee *after* the executory event has happened is adverse to the title of the executory devisee who makes no entry or claim. If the possession be withheld after entry or claim, then such detention of the possession is a species of *deforcement*; but until entry or claim, the tenant in possession, having entered by lawful title, is to be viewed as a tenant at sufferance; and we have seen (*ante*, p. 24,) that the possession of such a tenant is *not adverse* to the person entitled to enter; if so, the non-claim on the fine cannot commence until the executory devisee has entered or claimed.

[2 *Prest. Abs.*
308, &c.]

If a tenant in tail [previously to the statute 3 & 4 *W.* 4, c. 27, s. 39, discontinued, which must have been] by a *tortious* conveyance and took back a base fee, and then levied a fine and retained possession for five years after the base fee had determined, the remainderman or the reversioner would have been barred, because the discontinuance, being by *tortious*

So, if lands were given to *A.* and *B.*, and the heirs of the body of the survivor, and they joined in levying a fine, the entail would be barred; as the issue, who would claim the entail, must be privy both in blood and estate to one or the other of them; and they were *both* bound by the fine.

1 *Fearne*, 521,
and see *Butl.*
n. (1) to *Co.*
Litt. 191, a.

So, if lands were given to husband^{*2} and wife and the heirs of their two bodies, and the husband alone levied a fine, the issue would, at least before the statute 32 *Hen.* 8, c. 28, s. 6, have been barred, as they must have been privy both in blood and estate to the husband as well as to the wife.*

[*Cruise, Dig.*
5, c. 9, s. 12.
8 *Co.* 72.
Beaumont's
case, 9 *Co.*
140, a. S. C.
Cro. Car. 476.]

conveyance, turned their estates into mere rights, and constituted in itself a possession adverse to those in remainder: but it would have been otherwise if the conveyance by the tenant in tail had been by an innocent assurance, as then the estates of those in remainder would not have been divested, and the fine being then only of the base fee, would not have affected remaindermen. This case, therefore, seems different from that where a fine was levied by a tenant in fee subject to an executory devise: such a fine might be properly levied, and the effect was merely to pass the estate, not to destroy or divest the executory devise, which was but a bare right till the executory event happened; then it became an estate; and if the former tenant, retaining possession afterwards, levied a fine, and the executory devisee allowed five years to elapse without entry or claim, he might well enough have been barred.

[*Seymour's case*,
10 *Rep.* 95.]

* The same consequence would, it is apprehended, ensue since that statute. The statute enacts (s. 6), that no fine by

[5 *Cru. Dig.*
ch. 13, s. 25.
11 *Hen.* 7,
c. 20. 32 *Hen.*
8, c. 36, s. 2.
See also 3 & 4
W. 4, c. 74,
ss. 16, 17.]
34 & 35 *Hen.*
8, c. 20.
[3 & 4 *W.* 4,
c. 74, s. 18.]
Cov. Rec. 221.

A widow is prohibited by statute from levying a fine of lands moving from her husband.

So, if a gift be made by the crown as a reward for services, to a person in tail, the tenant in tail is restricted from barring such entail by statute.

A fine is no bar to a remainder or reversion

the husband alone of any lands, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be a discontinuance thereof, or be prejudicial or hurtful to the said wife or to her heirs: but that the same wife and her heirs may lawfully enter into all such lands any such fine, feoffment, or other act to the contrary notwithstanding.—The husband and wife are tenants by entireties in tail; if the husband died, the entire estate tail survived to the wife, who might have levied a fine or suffered a recovery thereof to the use of herself or a stranger in fee; but if she died without having destroyed the entail, it descended to the issue, who, though they inherited from their mother, as the person last seised, were obliged to make their pedigree through their father also; and he having levied a fine, the descent through him was estopped, and the issue, being thus heir to one only of the donees could not inherit. *Greneley's case*, 8 *Co.* 71, b. The statute of *H.* is obviously confined to inheritances of the wife *alone*, and does not embrace inheritances of which she is seised *jointly* with her husband. As against the wife surviving, the husband's fine would not be available, unless the land originally belonged to the husband. Then, indeed, she would be a tenant in tail of the gift or provision of her husband, and could not alien in fee after her husband's decease without the consent of the heir in tail, or the person next entitled in remainder, *vide Stat. of Jointure, infra*, ch. *Stats.*

which is in another person, so he claim within the time prescribed by the statutes; for the remainderman, or the reversioner, claims paramount the cognizor: but, if the tenant in tail have the reversion in himself, he may pass a clear fee. The operation of a fine [previously to the statutes 3 & 4 W. 4, c. 74, s. 39, and 4 & 5 Ib. c. 92, s. 37,] in the latter case, would be this:—The tenant in tail would, by such fine, pass a *base fee* to the cognizee, derived from the estate tail, and also a clear and absolute fee of which he was seised in reversion; and as two fees cannot subsist together in the same person, the base fee would merge in the absolute one, which consequently, would come immediately into possession: [but by the above acts, the base fee, upon the union with the reversion, is enlarged into an absolute fee so as to exclude the reversion.]

1 *Salk.* 338.
Symonds v.
Cudmore,
 5 *Durnf. &*
East, 109,
 note.

But as a tenant in tail might *charge* his reversion, [care was requisite in bringing the reversion into possession, lest the charges should] immediately attach. It was, therefore, often prudent to suffer a *recovery*; which gave a new fee not subject to those charges.* But, even in

[5 *Cru. Dig.*
 tit. 35, c. 9,
 s. 53. c. 12,
 s. 10. *Ib.* tit.
 36, c. 7, s. 30.]

* But unless some encumbrance appeared, or the title to the reversion was not clearly deduced, the Court would not compel a vendor to suffer a recovery on a mere conjecture that the reversion had been encumbered. Thus, in a late case, (*Sperling v. Trevor*, 7 *Ves.* 497,) upon an exception to the master's report in favour of the title, the objection was, that

the case of a recovery, the estate would be chargeable *as to the acts of the recoveree himself*, upon the principle that no man shall be permitted to defeat his own charges by an act of his own. A recovery, therefore, only let in the charge of *the person suffering it*, while a fine let in the

one *Elizabeth Baker* ought to join in a recovery; the title being derived from *John Paine*, who in 1693 limited the estate to the use of himself for life, with remainder (subject to a term) to uses which never arose; with remainder to his daughters in tail; with remainder to himself in fee. Under these limitations, *Elizabeth*, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, *Elizabeth* his daughter entered, and levied a fine to the plaintiff in fee. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been disposed of by *John Paine*, and if so, it could not have been barred by the fine which had been levied, therefore he insisted on a recovery to clear up all doubt. The Lord Chancellor, however, held that a recovery was not necessary, and decreed the purchaser specifically to perform his contract. 7 *Ves.* 497.

It will occur to the learned reader, says *Sir Edward Sugden*, that, notwithstanding the defendant's suggestion, it was highly improbable that the reversion was disposed of by *John Paine* in his lifetime, such an interest not being marketable; and as he devised all his estate by his will, there was no ground to presume that he made another will. Upon his death, therefore, the reversion descended to his daughter, who by her fine reduced it into possession, and, consequently, no encumbrance could afterwards be created upon it, as a reversion distinct from the particular estate. *Sugd. V. & P.* 314, ed. 6.

charges of the ancestors seized of the reversion, as well as those of the cognizor.

As a recovery immediately barred remainders over in another, which a fine would not do, as well as prevented the charges of the ancestor of the recoveree from attaching, it was generally the most effectual assurance.* A fine, however, was sometimes preferable, and often the only assurance to be adopted.†

* Especially as the extra cost of a recovery over a fine was in general found to be less than the expense of investigating and proving the title to the reversion.

[† As where the person seized of the first estate of freehold would not, or from absence abroad or mental incapacity could not, concur in making a tenant to the *præcipe*. Sometimes, too, it happened that delay in barring the estate tail would lead to very serious inconvenience to the parties interested, and a fine was resorted to from necessity, as a recovery could be suffered in Term time only ; but a fine might be levied during the Vacation.] If, again, the tenant in tail was dangerously ill in the Vacation, and he wished to acquire the fee for the purpose of devising it in a different channel from that prescribed by the entail, as a recovery could not be suffered till the ensuing Term, the next best step was to acknowledge a fine to the intended tenant to the *præcipe*, preparatory to a recovery being suffered, with uses for the benefit of the tenant in tail until the recovery should be completed ; as then the entail would be barred at all events, and the tenant in tail might, in a subsequent Term, should he survive, suffer a recovery, and the fine and recovery would both together form but one assurance. [If he did not survive, the] base fee acquired by the fine might then be devised, either for payment of debts, or among children and relatives, instead of

1 Co. 84, a.

A fine would, in certain cases, bar *by estoppel* where a recovery would not do so.* A fine might be levied of an entail *in remainder* without the concurrence of the person having the freehold; but a recovery could not be suffered but by the act of the person having *the freehold in possession*.†

[5 Cru. Dig.
tit. 35, ch. 9,
s. 9. 48.]
3 Co. 86, a, &c.

But, in order to *bar* an estate tail, whether in possession or remainder, the fine must have been with *proclamations*, according to the statute; for otherwise it would only work *a discontinuance*.‡

being permitted to descend to the next heir in tail, who might possibly be of distant kindred.

[* In the recent case of *Doe v. Oliver*, 10 Barn. & Cress. 181, an estate was devised to *A.* for life, with remainder to such of the children of *B.* as should be living at the death of *A.*, in fee. *B.* had one daughter, who, with her husband in *A.*'s lifetime, levied a fine *come ceo*, &c. to *C.* It was decided that the fine of a contingent remainderman had a double operation; and that though it operated by estoppel during the contingency, it did not operate by estoppel only, but had an ulterior operation when the contingency happened; that the estate, which then became vested, fed the estoppel; and that the fine operated upon that estate, as though it had been vested in the conusors at the time the fine was levied.]

† So a fine was the preferable assurance for obtaining a speedy bar by non-claim. On a recovery the bar was measured by the Statute of Limitations. On a fine it accrued in five years from the last of the four proclamations, that is, in fact, in six years from the time it was levied.

Discontinuance

‡ A discontinuance caused a suspension of the title under the estate tail, and gave a new and wrongful title to an

If a married woman were a party to a fine, it would bar her, it being a matter of record, as the

Harg. n. (1)
to *Co. Litt.*
121, a.

estate in fee-simple by force of the alienation. It was an abandonment of the estate tail, and the assumption and conveyance of a *new* and wrongful estate in fee. If a tenant in tail discontinued and took back an estate tail, the new entail would devolve in the channel marked out by the discontinuance, and not in that prescribed for the entail discontinued. But to enable a tenant in tail to create a discontinuance, he must have been seised of the immediate estate of freehold in fact or in law by virtue of the entail; if he had a mere right, or an estate tail in reversion, his conveyance would not thus operate. In *Roe v. Elliott*, 1 *Barn. & Ald.* 85, a tenant in common in remainder levied a fine of the entire estate and afterwards obtained possession of the whole premises. His companion brought an ejectment against him, when it was objected that the fine operated by discontinuance, and that an entry was therefore necessary to avoid the fine in order to support the ejectment. The Court held otherwise and gave judgment for the plaintiff.

[*Doe v. Jones*,
1 *Bar. & Cress.*
238, 242, &c.,
1 *Cr. & Jer.*
528.]

The *consequence* of a discontinuance [previously to the statute 3 & 4 *W.* 4, c. 27, s. 39, was] that it took away from the issue and remaindermen their right of *entry*, and from the remaindermen and reversioner their power of alienation to a *stranger*. It converted the interest of these persons into *rights of action*, which could not be devised or assigned, but such rights might be *released* to the person in possession or bound by estoppel; and the action to be used for the restoration of these rights was not an ejectment, but a species of real action called a *formedon*, which, as to the issue, could not be commenced until after the death of the tenant in tail, and as to those in remainder could not be maintained until after a failure of the issue and a determination of all prior remainders; moreover such a writ must have been brought

compromise of a suit; and in levying it, the wife was examined apart from the husband, that any compulsion on his part, might, as much as possible, be avoided. A fine, therefore, was essential to give validity to her conveyance of freehold lands (except where a recovery was re-

Plowd. 514.
Eare v. Snow.

within twenty years after the right had fallen by the former Statute of Limitations, 21 *Jac.* 1, c. 16.

[But now by the stat. 3 & 4 *W.* 4, c. 27, s. 39, it is enacted, that no descent cast, discontinuance, or warranty, shall, after the 31st day of *December*, 1833, toll or defeat any right of entry or action: and, by the 36th section, real and mixed actions, and, among others, writs of *formedon* are abolished.]

[*Fearne, Post. Works*, 442, and consider *Beaumont's* case, 9 *Co.* 140, a. b.]

But the tenant in tail discontinuing, and also the issue in tail for the time being after his death, provided the entail ever gave a vested interest, might bar the entail by fine, and the remainders by recovery, although the entail and remainders had no continuance as a seisin, and by that means convert the base fee created by the discontinuance into a fee-simple, and the tenant of the base fee might, by fine with proclamations and five years' non-claim, bar the issue and remaindermen after their rights had accrued. A distinction, however, should be noticed as to the power of the tenant of the base fee to obtain the effect of non-claim. If his estate were created by an innocent assurance, then his fine [levied during the lifetime of the tenant in tail who created the base fee would] be nugatory on the issue and remaindermen; but if his estate were created by tortious alienation, then the entail and remainder having been once discontinued, and the interests under them turned into mere rights, the non-claim on the base-tenant's fine would bar those divested rights. This subject is amply discussed in 1 *Pres. Abs.* 367, 375. 2 *Ib.* 306, 318, 413, *et infra*, ch. *Rec.* last note there.

quired,) and was most commonly levied for the purpose of barring her claim to dower.*

* Equitable estates and interests in married women required the aid of a fine or recovery to pass or encumber them, in the same manner as if the estate or interest were legal, except in the instance of a conveyance to trustees in trust for the *separate use* of a married woman, with power for her to assign and dispose of the same notwithstanding her coverture. The maxim is *equitas sequitur legem*; and in all cases where a fine or recovery would be necessary if the estate were legal, *there* a fine or recovery was requisite to pass an equitable estate or interest. In *Wright v. Cadogan*, 2 *Eden*, 258, Lord Northington observed, "that there was no rule so certain, so general, and so strongly adhered to by the ablest judges who had presided in equity, as to observe *in omnibus* the rules of law with respect to the regulation of property, and that such rules had been always strictly observed as principle in a Court of equity;" and *per Lord Hardwicke* there are but two ways by which a married woman can prevent the inheritance of an estate settled to her separate use from descending upon her heir at law, namely, by reserving such power to herself by a conveyance to uses and trusts before the marriage, or else *by fine*, in which she and her husband shall join after the marriage, with a deed to lead the uses of it, reserving such power to herself. And his Lordship denied that a woman having a real estate before marriage could, in consideration of that marriage, enter into an agreement with her husband, that she may, by writing under her hand executed in the presence of witnesses, or by will, dispose of her real estate. He said that this rested in agreement, and that though it might bind her husband from being tenant by the courtesy, yet that it could not bind the wife's heir. Hence it is inferred that Lord Hardwicke was of opinion that the mere limitation of a real estate to the separate use of a married woman and her heirs does not confer upon her the power of

*Secs. 41, &c.
77, 79, &c.*

[Now by the stat. 3 & 4 W. 4, c. 74, a married woman may, by a deed in conformity with its provisions, not only bar her dower, but, with the concurrence of her husband, dispose of her real estate in the same manner as if she were a *fême sole*.]

disposing of the reversion as she pleases. *Mr. Roper*, in treating of this subject, thus lays down the doctrine:—With respect to rents and profits of real estates, a gift of them to the wife for her separate use enables her to dispose of them as a *fême sole* in the same manner as she may do of personal estate so limited to her: but in the following respect there is a difference between the two estates; a limitation of real estate to the wife in fee to her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage otherwise than by *fine or recovery*; because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by the general law, and if she omit to do so her heir will take the estate; but it has been settled that when *personal property* is given or agreed to be given, to the separate use of a married woman, she may dispose of it as a *fême sole* to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose. 2 *Rop. Bar. & Fem.* 185, citing 1 *Bro. C. C.* 16.

[The late case of *Doe v. Scott*, 4 *Bing.* 505, confirms the preceding distinction so far as respects real estate: there an estate was devised to a trustee in fee in trust for the separate use of *S. S.*, and to convey the same to her, her heirs and assigns, free from the debts and control of her present or any future husband, and to permit her to take the rents and profits. *S. S.* being married, devised the property in question, and died in the lifetime of her husband: the Court of *C. B.* decided, that *S. S.* had no power to devise.]

As an use immediately arose on a fine, such use was immediately executed by the statute, and might be led or declared as the parties pleased.*

See *Watk. on Desc.* 18, n. (2), p. 28, 2d edit.

The proper way of limiting real estate to a married woman for her separate use is to convey it to trustees and their heirs to such uses as the wife shall, whether single or covert, direct or appoint, and in default of appointment and subject thereto [to the use of the trustees during the wife's life, upon trust to pay the rents to her separate use, either with or without the clause restraining anticipation, and after her decease, to the use of the wife her heirs and assigns,] with a clause making the receipts of the wife or the person to whom she should appoint or assign the same valid discharges, with a power in the wife to change the trustees as often as shall be necessary.

[* *Mr. Butler* in his valuable note to *Co. Litt.* 271, b, observes, "With respect to a feoffment, fine, and common recovery, the transfer or transmutation of the possession from the feoffor, conusor, and recoveree to the feoffee, conusee, and recoveror, is effected solely by the operation of these conveyances or assurances at *common law*; and if the use is declared to the feoffee, conusee, or recoveror in fee simple, the conveyance is completed at the common law, in the same manner as if the Statute of Uses had never passed. It is only when the use is declared to a *third person* that the statute has any operation; and then by the operation of the statute, the possession previously transferred or transmuted to the feoffee, conusee, or recoveror, by the operation of the feoffment, fine, and common recovery at the common law, is divested from the feoffee, conusee, or recoveror, and vested in the *cestui que use* by the statute. *Vid. sup.* pp. 266, 267.

We may in this place remind the student that, with the

exception of the bars by estoppel and non-claim, all the advantages which formerly resulted from a fine, may now be obtained by a deed of disposition in conformity with the statutes by which fines were abolished: and the power of alienation possessed by the tenant in tail through the medium of a fine, is now considerably extended by the beneficial provisions of those statutes which substitute a more simple and less expensive mode of assurance.]

CHAP. XVI.

OF A RECOVERY.*

As a fine was the *compromise* of a fictitious suit, so a recovery was a fictitious suit *carried on to judgment*.

2 *Bl. Comm.*
357. *Touchst.*
c. 3, p. 37.
Pig. on Recov.
5 *Cruise, Dig.*
tit. 36, ed. 4.

By the common law, the person who had the immediate freehold, or freehold in possession, was to answer the claims of strangers. Against him the writ, or *præcipe*, was brought. Hence, no recovery could be suffered unless *the recoveree had the freehold in possession in him*; as the recovery, or suit, was founded on the *præcipe*, which could only be sued out against *the tenant of the freehold*.

A person therefore, who had an estate tail *in remainder*, could not suffer a recovery alone; the tenant of the particular estate of freehold in possession must have concurred, against whom, or

[* Now abolished as to lands in *England* by stat. 3 & 4 *W. 4*, c. 74, from 31st *December*, 1833; and as to lands in *Ireland* by stat. 4 & 5 *W. 4*, c. 92, from 31st *October*, 1834.]

5 Cru. Dig.
384, ed. 4.
So a recovery
might be of
Tithes, &c. by
the stat. 32
Hen. 8, c. 7,
s. 7.

against whose alienee, the *præcipe* must have been brought ; and the remainderman must have come in *by voucher*. A recovery might indeed, have been suffered of *a trust estate* without the concurrence of the person in whom the legal estate was vested ; but this was only from necessity, and to preserve an analogy in the assurance, or mode of destroying an estate tail.*

*Equitable
recovery.*

* A recovery of the equitable estate must in all respects have corresponded with a recovery of the legal estate, so as to keep up a strict analogy between them.

1st. There must have been a recovery deed, or rather a conveyance of the equitable freehold to the tenant to the *præcipe*, if it was intended to suffer the recovery with double voucher.

2nd. There must have been an original writ, with judgment and execution thereon, the same as in a legal recovery ; for there was not any distinction as to form and ceremony between an equitable and a legal recovery.

3rd. There must have been a good tenant to the *præcipe*. He must have had an estate of equitable freehold ; that is, a right to the immediate beneficial interest in possession. Thus, if the legal estate in fee was limited to trustees in trust for *B.* for life, with remainder in trust for *C.* in tail, with remainders over, *C.* could not suffer an equitable recovery without the concurrence of *B.* But it was not requisite that the tenant to the *præcipe* should have the equitable distinct from the legal freehold ; the legal estate in him was not any objection to an equitable recovery. 3 Ves. 126, 276. Thus if *A.* was the owner of both the legal and equitable estate for life, his concurrence was nevertheless necessary ; and a recovery suffered on a writ brought against a tenant, to whom the legal estate had been conveyed in conjunction with the beneficial interest, was deemed an equitable recovery. 1 Bro. C. C. 72. 3 P. Wms. 171. 3 Ves. 128. In a case where the legal estate

The person *against whom* the writ was brought was called the *tenant*, as he was always *the imme-*

was limited into and to the use of *A.* for life, with remainders over, and afterwards the next remainderman covenanted to settle the estate on him in tail, so that he had an equitable estate tail and a legal estate for life, and *A.* suffered a recovery, it was objected that he, being a tenant for life at law, ought first to have obtained a conveyance according to the articles, in order that he might have been seised of the legal estate in tail likewise; in effect, that a recovery suffered on a tenancy to the *præcipe* so constituted could not bar the equitable estate-tail and remainders over. But the Court held otherwise. 2 *Freem.* 180. 1 *Ch. Ca.* 49, 213.

A recovery by a tenant in tail of an equity of redemption, expectant on a mortgage in fee enlarged the equitable estate-tail into an equitable fee-simple. If the mortgagee joined, the recovery was partly legal and partly equitable, although it was not open to objection on that account.

[Until the recent case of *Nouaille v. Greenwood*, 1 *Turn. & Russ.* 26, it does not seem to have been settled, whether the concurrence of the mortgagee was essential to the validity of the equitable recovery; and in order to obviate the doubt upon the title, it was considered imprudent to dispense with his concurrence. In that case the mortgagee did not concur, and the recovery was considered valid. The student will find the arguments for and against the validity of the recovery stated with perspicuity and accuracy in a note by *Mr. Butler*, *Fearne's C. R.* p. 61, *ed.* 8.]

4th. There must have been a voucher of the equitable tenant in tail and a recovery over in value against the common vouchee, in order to bar the equitable entail. 2 *Ch. Ca.* 63, 78.

5th. The remainders must have been equitable as well as the particular estate. Thus, under the old uses to bar dower, a conveyance was made to *A.* and *B.* and the heirs of the said

diate tenant of the freehold. The person suing the writ was called the *demandant*, as he claimed or demanded the premises as his right and inheritance, alleging that the tenant had *disseised* him, or at least had come in *under* the disseisor, or *in the post*. The tenant then called on the *remainderman*, or the person under whom he claimed, to warrant his title, which was denominated *vouching* the person, who was thence called the *vouchee*. The vouchee either vouched over, or

A., nevertheless as to the estate of the said *B.* in trust for the said *A.*'s, his heirs and assigns. *A.* died in the lifetime of *B.*, and conceiving himself to be entire owner, devised the estate to *C.* in tail, who suffered a recovery, without the concurrence of *B.*, which was held bad. 3 *Barn. & Cress.* 799. By the above limitation *A.* and *B.* took as joint-tenants for life, with a several inheritance to *A.* in fee; on *A.*'s death the whole estate survived to *B.*, who nevertheless held it in trust for *C.*: so that *C.* had the equitable freehold for the life of *B.*, and a legal remainder in tail. His recovery could only operate on his equitable interest; and consequently the legal entail and remainders were not barred. But though an equitable recovery would not affect the legal estate nor any interest therein, a legal recovery would, if the person suffering it had also the beneficial ownership, bar both the legal and equitable entail, remainders, and reversions; yet it should be kept in review, that an equitable remainder, though in the person who had the whole legal fee, might be barred by an equitable recovery, [as where an estate was conveyed into and to the use of *A.* and his heirs in trust for *B.* in tail, remainder to *A.* in tail, a recovery by *B.* without the concurrence of *A.* would bar *A.*'s remainder.] 3 *Ves.* 120. 18 *Ib.* 395, 419. 11 *East*, 458. *S. C. contra.* 3 *Taunt.* 316. See further on this subject, *Grenville v. Blyth*, 16 *Ves.* 224. *Cov. Rec.* 321.

made default.* On default made, judgment was given that the demandant should recover against the tenant, and that the tenant should recover against the vouchee or warrantor and so on, which was called the *recovery in value*, or *recompence*, and was always supposed to go *as the lands would have gone if they had not been recovered*.

When the *præcipe* was brought *immediately against the tenant in tail*, it only barred him of the estates of which *he was then actually seised*. It was therefore usual for him to convey an *estate of freehold to another person*, that the *præcipe*

* He never made default, but always vouched over the common vouchee. It was the common vouchee who made default, and on that default judgment was given that the first voucher be recompensed by the common vouchee for the lands lost by his inefficient warranty. This recompense (consisting of lands of equal value) was supposed to pass from the common vouchee to the first vouchee, to be holden by him in tail with remainders over, in the same manner as he held the lands recovered from him; and this fictitious recompense was the sole cause of bar. Whence it is evident, that if the first vouchee made default, there was no one from whom he could recover a recompense to descend in the channel marked out by the original gift; and consequently, that the issue and remainderman would not be barred. The importance of a voucher of a common vouchee is hence apparent. In practice, it was common to require evidence of this voucher; but, as it was mentioned in the exemplification that the common vouchee was vouched over, it was not necessary to go further. Indeed, a recovery could not be recorded without a voucher of the common vouchee.

might be brought against such person (who was called *the tenant to the præcipe*), and that such person might vouch the tenant in tail; for if the tenant in tail came in as *vouchee*, it barred every latent right and interest which he might have in the lands.

If the *præcipe* was brought *immediately against the tenant in tail*, and he vouched over the *common vouchee*, it was called a recovery with *single voucher*; if against *the tenant of the freehold*, and he vouched over *the tenant in tail* and *the tenant in tail vouched over the common vouchee*, it was called a recovery with *double voucher*; and so on, according to the number of persons vouched. And it was always proper to suffer a recovery with at least a double voucher, if an entail was to be barred, for the reasons before alleged.

Ante, b. 2, c. 15, & *vide post*, b. 3, c. 4.
[*Blosse v. Clanmorris*, *ante*, p. 222.]

A recovery barred not only an estate tail, but all remainders or reversions expectant upon it if they were not in the Crown.*

* It expanded the entail into a fee commensurate with the estate of the person who created the entail, at the same time barring and destroying all remainders and reversions over, which after an estate tail are considered as mere ciphers. 5 *T. R.* 107. A fine, on the contrary, extinguished the estate tail and accelerated the reversion. Cross and contingent remainders were also barred by a recovery, and all conditions, springing, shifting, secondary and future uses, collateral and conditional limitations, executory devises,

[*Doe v. Lord Scarborough*, 3 *Adol. & Ell.* 2.]

The recoveror, generally speaking, on his recovery, gained a clear and absolute fee of the premises, freed from all charges but those of the recoveree. Hence it was preferable, in

powers, authorities, and other estates and interests annexed to the estate tail, and also all rents, liens, charges, and incumbrances subsequent to the same, provided the recovery was suffered before the condition or event happened on which the proviso or conditional limitation was to take effect. *Butl. Fearn*, 73, 428, 7th ed. 1 *Mod.* 108. 2 *Lev.* 29. 2 *Salk.* 570. *Pig.* 176. *Cowp.* 379. 4 *Burr.* 1930. 5 *Madd.* 371. 8 *Taunt.* 861, where a power of sale was held destroyed by a recovery. But this was the effect of a recovery when suffered by a tenant in tail, whose proper and peculiar mode of assurance [previously to the recent statutes 3 & 4 *W.* 4, c. 74, and 4 & 5 *Ib.* c. 92, was] a recovery. When a recovery was suffered by a tenant in fee simple, it operated merely as a conveyance not as a bar. Hence an executory devise on an estate in fee could not be barred by a recovery; but if it was annexed to an estate tail) it might, *ante*, p. 212.

Another peculiar effect of a recovery by a tenant in tail was to render valid all former acts of ownership exercised by him, and to confirm and let in all his preceding incumbrances. Thus if he made a lease contrary to the statute, mortgaged his estate tail, acknowledged a judgment, entered into a recognizance, or executed a bond, and then suffered a recovery, the several incumbrances thereby became available charges on the inheritance, and took precedence of any estate created by the recovery. If a tenant in tail made a settlement by lease and release, and then suffered a recovery, it is apprehended that this recovery would not deprive the *cestuis que use* under the settlement of the *legal estate*. Before the recovery those persons had a base fee, which the recovery enlarged into a fee-simple. As to the effect of a recovery on a prior will, see 1 *Pow. Mortg.* 112, a. 113.

Pig. Recov. 32
—34. 55.
5 Cru. Dig.
tit. 36, c. 9,
ed. 4. *Plowd.*
515.

some cases, to a fine, though a fine might bar the estates, as a fine might let in the incumbrances of the ancestors as well as those of the cognizors. In some instances, however, a fine was preferable to a recovery, as the former was *an estoppel* by the statute, where a recovery would not estop.

Plowd. 514.
Eare v. Snow.

A recovery might be suffered by a tenant in fee-simple in order to strengthen the title. So, as it was a suit in the progress of which a *fême covert* was secretly examined, it would bar her of her claim to dower.*

* In an anonymous case in 11 *Mod.* 121, it is said to have been holden, that if a tenant in tail levies a fine, he is for ever hindered from suffering a recovery to destroy the remainder in fee, "because the fine has turned the estate tail into a base fee, and determined all privy of estate existing between him and the remainderman, who could not now be vouched over, unless he voluntarily consented to it." The law on this point is taken to be otherwise (*ante*, p. 402,) clearly, if the use on the fine were declared to a stranger; but if it were declared in favour of the tenant in tail, then the want of privy between him and the remainderman, as above noticed, seems to present an impediment to his suffering a recovery while he was seised in respect of the base fee. If he died leaving the base fee to descend to his general heir, and the heir under the entail was a different person, then that heir might suffer a recovery; but the above case, with some shew of principle, throws a doubt at least on the question, whether a tenant in tail, having levied a fine and taken back a base fee, could himself suffer a recovery afterwards. If the tenant in tail and remainderman in fee joined in a fine, then

the base fee became merged in the reversion, and a recovery could not it is apprehended, have been afterwards suffered ; for although the use resulted to the parties to the fine according to their former ownership, yet the tenant in tail took back a base or determinable fee by original limitation, arising out of the amalgamated seisin of the estate tail and remainder ; and it is settled, that the tenant of a determinable fee could not suffer a recovery. *Pig. 129. 1 Mod. 111.*

[By the 19th sect. of the 3 & 4 *W. 4, c. 74*, it is enacted, ^{4 & 5 *W. 4,*}
that after the 31st day of December, 1833, in every case in ^{*c. 92, s. 16, (1).*}
which an estate tail in any lands shall have been barred and converted into a base fee, either before, on or after that day, the person, who if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands, as against all persons, including the king's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination, or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee-simple absolute : saving always the rights of persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by the act authorized to be made.

In this place it may be observed that the right of alienation which a tenant in tail formerly enjoyed, through the medium of a common recovery, he may now exercise, by a deed of disposition in conformity with the above statutes ; which also confer upon him some additional powers.]

PRINCIPLES
OF
CONVEYANCING,
&c. &c.

BOOK III.

OF CONVEYANCES, WITH RESPECT TO PARTIES.

CHAP. I.

OF AN INFANT.

AN infant may *take by purchase*, as he may do anything which is manifestly for his advantage ; and, if a feoffment be made, livery may be given to him in person, or even to another whom he shall appoint as his attorney ; though the appointment of an attorney by an infant is not valid in itself at law.*

Co. Litt. 2, b.

1 *Roll. Abr.*
730. *Enfant*,
(D.) *pl.* 6. See
3 *Burr.* 1794,
&c.

* The acts of infants are distinguished into those which are absolutely void, and those which are voidable merely.

Co. Litt. 2, b. But he may waive such conveyance when he comes of age; or if he do not then actually agree to it, his heirs may waive it after him.*

This distinction is very important, 1st, because a *voidable* contract may be afterwards established by a confirmation either express or implied, but a *void* contract cannot (*ante*, chapter *Confirmation*); and, 2ndly, because where the contract is *actually void*, neither party is bound by it; but where it is only *voidable*, the power of rescinding the contract is vested in the infant alone,—the other party being absolutely bound, if the infant, when of full age, chooses to hold him to his agreement. *Clayton v. Ashdown*, 9 *Vin. Abr.* 393. *Holt v. Ward, Clarencieux*, 2 *Str.* 937. The precise criterion, however, of this distinction is not clearly settled. On the one hand, it is said to depend entirely on the circumstance, whether the act is for the *advantage* or *disadvantage* of the infant; and that if it is an act which cannot be to the advantage of the infant it is actually void, but if it may be for his benefit it is only voidable. *Zouch v. Parsons*, 3 *Burr.* 1794. *Holt v. Ward, Clarencieux*, 2 *Str.* 937. *Allen v. Allen*, 2 *Dru. & W.* 307. 1 *Con. & L.* 427, (I.) On the other hand the distinction has been made to depend solely on the *mode* in which the transaction takes place; it being said that all such gifts, grants, or deeds of an infant, as do not take effect *by the delivery of his hand* are void, but that those which do so take effect are only voidable. *Perk. s.* 12. The case referred to in the text, in 1 *Roll. Abr.* 730, was decided on the former of these grounds; the words being, “If a man makes a feoffment to an infant, and the infant makes a letter of attorney to another to receive livery for him, it is good, *because it is for his benefit.*” The latter of these grounds was adopted by the Court in the case of *Zouch v. Parsons*, 3 *Burr.* 1794.

* It is not necessary that the infant should *expressly* agree to the bargain to be bound by it; an *implied* agreement is in

All conveyance, however, *by* an infant are voidable by him or his heirs, except a fine or recovery, which are only voidable during his minority.* All these conveyances are, never-

Touchst. 7. 145.
232. 5 *Cru.*
Dig. 127, ed. 4.
3 *Burr.* 1794.
Zouch v. Parsons.

all cases sufficient; and an agreement may be implied from any act amounting to an assent to the transaction. Thus the continuance in possession after he comes of age, of lands demised to him during infancy, is an acceptance of the lease. 1 *Roll. Abr.* 731, K. So the receipt of rent after he attains twenty-one, in respect of lands demised by him during infancy, amounts to a confirmation of the grant. *Cecil v. Salisbury*, 2 *Vern.* 224. *Smith v. Low*, 1 *Atk.* 489.

* The distinction is between matters *in pais*, as deeds, and matters of *record*, as recognizances, fines, recoveries. Matters *in pais* he may avoid either within age, or when he is of full age; but matters of record can only be avoided during minority. If, however, his age be tried during his minority, by the inspection of the judges, and it be recorded that he is within age, in that case even a matter of *record* may be avoided after the infant attains twenty-one. *Co. Litt.* 380, b. But though a recovery suffered by an infant *in person* could be avoided only during his minority, yet if he suffered a recovery by *an attorney*, it might be avoided at any time. *Stokes v. Oliver*, 5 *Mod.* 209. *Zouch v. Michil*, *Godb.* 161. This difference arises from the distinction already noticed, between matters *in pais* and matters of *record*. Where the recovery was suffered by the infant in person, it was wholly a matter of record, and therefore avoidable only during minority; but where it was suffered by attorney, the appointment of the attorney being a matter *in pais* might be avoided at any time; and that being avoided, the recovery founded upon it must necessarily fall to the ground with it. But on the other hand, where the matter of record is itself the basis of the transaction, or the principal, and the matter *in pais* is

theless, if they tend to his benefit, good till actually avoided ; but as to fines, the affidavit of acknowledgment by *dedimus potestatem*, stated, by rule of Court, that “ the parties were of full age ;” and, before that rule was ordained, the commissioners were subject to an attachment if they took the acknowledgment of an infant.

Zouch v. Parsons, ubi sup.

An act of an infant which *cannot* be to his advantage is void *ipso facto*.

5 *Cru. Dig.*
349. Ed. 4.

It was formerly the practice to petition the King for a privy-seal to enable an infant to suffer a recovery ; but this was disused, and subsequently recourse was had to an Act of Parliament.*

the accessory, that is, founded upon the matter of record, *there* the matter *in pais* cannot be avoided, without first avoiding the matter of record. Thus, if an infant suffered a recovery or levied a fine, and limited the uses thereupon, he could not avoid the deed declaring the use, without avoiding the fine or recovery also. 2 *Rep.* 58. 10 *Rep.* 42. Lastly it may be remarked, that a bargain and sale, though enrolled in a Court of record, is not such a matter of record as can be avoided only during minority, but the party may avoid it when he will. 2 *Inst.* 673.

* The course of proceeding under a privy seal was for the crown, upon petition of the infant or his guardian, to grant letters under the privy seal to the judges of the Court of Common Pleas, directing them to permit the infant to levy a fine or suffer a recovery ; and it was then in the discretion of the Court to permit the thing to be done or not, according to the circumstances. Sir *T. Plumer*, however thought it a singular mode of application to the King for a recommend-

An infant trustee or mortgagee might be ordered to convey even by fine, if not by recovery (see 3 *Atk.* 164), by a Court of equity, ^{1 *Watk. Copyh.* 63.} under the statute of the 7th *Anne*, *cap.* 19, and that act extends to the conveyance of copyholds.*

So an infant may, in some cases, exercise a ^{*Powell on Powers*, 43—} power; as where he is *a mere instrument*; † but, ^{54, & 1 *Ves.* 304.} it should seem, not otherwise.

ation to the judges to permit the infant to suffer a recovery, when it was in the discretion of the judges to permit the recovery to be suffered or not, as they thought proper; and he added, that it was questionable whether such a recovery was not reversible for error. 1 *Turn. & Russ.* 175. But in *Doe v. Rawding*, *Bayley, J.* said, that the modern practice of applying for an act of Parliament did not supersede the mode of suffering a recovery or levying a fine by privy seal, which was still part of the law of the land. 2 *Barn. & Ald.* 450. [The question, however, is now set at rest by the abolition of fines and recoveries.]

* The stat. 7 *Ann. c.* 19, has been repealed, and similar provisions made by the consolidated act. 1 *W. 4, c.* 60, *ante*, p. 260, *infra Statutes*.

† As in the case of a simple power of attorney at *common law*, *Co. Litt.* 52, a, or of a *collateral* power over real estates under the Statute of Uses. 1 *Sugd. Pow.* 213, *Ed.* 6. As to powers over real estates *not simply collateral*, if the express dispensation with the disability of infancy be not an ingredient in the power, it is settled that an infant cannot exercise it; but if there be an express dispensation, then it seems doubtful (there being no decision on the subject) whether the infant can exercise such a power or not. *Et vide* 1 *Sugd. Pow.* 215, 220, 1 *Chance. Pow.* 241, &c. *Prest. on Abst.* 1, 326. *Harg.*

1 Bro. C. C.
152. *Williams*
v. *Williams*, &
3 Ves. jun. 545.
Williams v.
Chitty.

And an infant may be bound by a fair and reasonable marriage settlement.*

& *Butl. Co. Litt.* 52, a. n. (2). 171, b. n. (5). 271, b. n. (1), VII. 2.

* A male infant cannot make a binding settlement of his real estate. This seems to have been always treated as a clear point. 4 Bro. C. C. 506, 510, 511. Whether a female infant can make a valid settlement of her real estate, was at one time very doubtful: but it seems now to be settled, that a female cannot be bound as to her real estate by any articles entered into during minority, but may refuse to be bound and abide by the interest which the law casts upon her when she comes of age or is discoverd; and her heir at law, if she dies during coverture, is entitled to the same election. The only way to bind a wife to articles made during minority, is to procure her concurrence [in a deed of disposition in conformity with the statutes 3 & 4 W. 4, c. 74, and 4 & 5 Ib. c. 92,] after she shall have attained her age of majority; she cannot testify her election in any other way. [Before those statutes she might have expressed her concurrence by fine or recovery.] If she dies without having joined her husband in a fine or recovery, [or by such deed of disposition] a right of election will accrue to the wife's heir, who may either affirm or repudiate the articles at his pleasure. But if he affirm the articles, it is conceived that such affirmation is not to be treated as a voluntary settlement on his part, so as to render the same voidable by his creditors. See on this subject the cases of *Clough v. Clough*, 5 Ves. 717. [*Milner v. Lord Harewood*, 18 Ves. 259.] *Simpson v. Gutteridge*, 1 Madd. Rep. 613.

As to the personal estate of a female infant, it seems that her interest in that species of property may be bound by agreement on her marriage; for, as Lord Hardwicke observed, if a parent or guardian cannot contract for the infant so as to bind her personal property, the husband, as it is a personal thing, would be entitled to it absolutely immediately on the

A guardian may make leases during the minority of his ward.*

2 Roll. Abr.
41. Garde (Q).
pl. 4. Bac. on
Leases, B. § 1.
(s. 9), p. 138.

marriage. *Harrey v. Ashley*, 3 Atk. 613. [The preceding observation must be confined to such personal estate of the infant as will vest in the husband by the marriage, and not to such as is reversionary; for a settlement of the latter species of property will not bind the wife's title by survivorship. *Stamper v. Barker*, 5 Mad. 165. *Ainslie v. Medlycott*, 9 Ves. 19. It is apprehended that settlements of the personal estate of infants are binding upon them, only to the extent of the husband's power over such personal estate; and that they are to be considered not as settlements by the *infants*, (who are incapable of contracting) but strictly as settlements by the *husband* operating upon all the interest which he may acquire by the marriage. If such personal estate is vested in the infant in *possession*, by the marriage it will become the absolute property of the husband, and he will be concluded by the settlement; if it is *reversionary*, his interest is qualified, and depends upon the personalty falling into possession during the coverture, or upon his surviving; in either of which events it will vest in him, and be bound by his settlement; but should he die previously, the settlement will not avail against his wife's title by survivorship; upon which the husband's contract is inoperative. See also *Simpson v. Jones*, 2 Russ. & Myl. 365, 374. But the wife may be bound by subsequent acquiescence. *Ashton v. M'Dougall*, 5 Beav. 56.

* By stat. 1 W. 4, c. 65, s. 16, infants or their guardians in the name of the infants by the direction of the Court of Chancery, are enabled to grant renewals of leases; and by the 17th sect. infants entitled in fee or in tail or to any absolute interest in leasehold are enabled themselves, or by their guardians, to grant leases or under-leases by the direction of the Court; provided no lease be made of the capital mansion-house and park for any period exceeding the minority of such infant.]

Sand. Uses, 87.

An infant may be seised to an use.*

See of the
stat. 10 §
11 *W.* 3,
N. (3) to *Co.*
Litt. 298, a. &
Watk. on Desc.
ch. 4.

And an estate may be limited by *way of remainder*, or *of use*, or given *by devise*, to an infant *en ventre sa mère*; but an *immediate* grant to such infant would not be good, as it would be *in futuro*.† In the case of a devise,

* By the custom of particular places, as of gavelkind in *Kent*, an infant may *sell* his lands by feoffment at the age of fifteen, [and the livery must be made *propria manu*, and not by attorney.] *Rob. Gavel.* 193. 2 *Black. Com.* 84. But such custom being construed strictly, it is apprehended he cannot *mortgage* them. It is also observable, that an infant of any age may present to a church. *Arthington v. Coverly*, 2 *Eq. Ca. Abr.* 518. *Hearle v. Greenbank*, 1 *Ves. S.* 304. And an infant, [before the late statute 1 *Vict. c.* 26, might] make a will of his personal estate; but there is a great difference of opinion about the *earliest* age at which such a will might have been made. See *Harg. Co. Litt.* 89, b. n. (6). At the age of eighteen, however, there seems to be not much doubt that a male infant might make a will of personal property. In 1 *Ves.* 303. 3 *Atk.* 709, the Chancellor mentions seventeen, but speaks very ambiguously of a will being good if made at an earlier age. [But now by the 7th section of the above statute it is enacted, that no will made by any person under the age of twenty-one years shall be valid; the 34th section limits the operation of the act to wills, made on or after the 1st day of *January*, 1838.]

† Posthumous children are now considered as actually born to all purposes, except in the case of a descent at common law; and in the case of a descent, the heir presumptive gives place to the real heir when born. See on this subject *Thellusson v. Woodford*, 4 *Ves.* 334, 335. *Doe v. Clarke*, 2 *H. Black.* 399. An infant *en ventre sa mere* might be

the fee will descend to the testator's heir at law till the child be born ; in that of the remainder, the freehold is in the particular tenant, and the remainder vests in the child, though unborn, by the statute 10 & 11 W. 3, c. 16, and in the case *Infra statutes.* of the use, the legal estate is in the trustee.*

vouched in a recovery ; may be an executor ; may take by devise, or under a charge for portions ; may have an injunction and a guardian, 4 *Ves.* 322 ; [will be entitled to a legacy bequeathed to children born, 1 *Sim. & Stu.* 181 ; and as to real estate, see 1 *Bos. & Pull.* 243. 5 *T. R.* 49.] It may be remarked, however, that where an infant is appointed executor, he cannot act as such till the age of twenty-one, till which time administration must be granted to another. 38 *G.* 3, c. 87.

[* The meaning of the author is not very apparent in the concluding words of the above sentence : the use would immediately vest in the child unborn, and with it the actual legal estate ; as if a conveyance were to *A.* and *B.* and their heirs to the use of *C.* for life, with remainder to the use of the child with which she is *enceinte*, and to his or her heirs ; so if the whole legal fee were vested in *A.* and *B.*, in trust for the child *en ventre sa mère*, the equitable estate or interest would equally vest in the child, as if the conveyance were to *A.* and *B.* and their heirs to the use of *C.* for life, remainder to the use of *A.* and *B.* and their heirs in trust for the infant *en ventre sa mère*, and his or her heirs.

CHAP. II.

OF HUSBAND AND WIFE.*

Litt. s. 291, & Co. upon that sect. 5 Durnf. & East, 652. Doe v. Pur-ratt, 2 Cru. Dig. 374. Ed. 4.

As the husband and wife are but one person in law, if an estate be limited to them, they shall not take as joint-tenants (for a joint-tenancy necessarily implies a plurality of persons), but the entirety is in each; and neither can alien without the other.† If it be limited to the husband and wife and another person, that other person shall take a moiety in joint-

[* As to the husbands of female trustees, see stat. 1 *W. 4, c. 60, s. 19.*]

† Those words in a conveyance which would make other persons joint-tenants will, when used in a limitation to a husband and wife, make them tenants by entireties, so that neither can alone sever the jointure, but the whole must accrue to the survivor. *Green v. King, 2 Bl. Rep. 1211.* An estate, however, may be so *limited* as to make a man and his wife take in severalty if need be; and the husband and wife might together, by fine or recovery, dispose of an estate held by entireties during the coverture. *Co. Litt. 187, b, 188, a, et ante, 177,* where this peculiar tenancy is treated of more fully. [And now that fines and recoveries are abolished, husband and wife may convey by a deed of disposition in conformity with the statutes 3 & 4 *W. 4, c. 74, s. 77, &c.*, and 4 & 5 *Ib. c. 92, s. 68, &c.*]

tenancy with the husband and wife; and the husband and wife shall have the other moiety by entireties, as they are but one person in law.*

[In regard to the *choses in action*† and chattels real and personal estate of the wife, the following distinctions may be here noticed. The husband is absolutely entitled to his wife's chattels personal in possession, and he may dispose of them at pleasure: and if he survives her, he is also entitled to her *choses in action*, as her administrator. But if she survives they will be hers by survivorship. With respect to her chattels real in *possession*, the husband has in them a qualified title only; he may, during her life, absolutely dispose of them, but they will not pass by his will against her surviving; but if he survive, they become his, and will pass by his will, though executed

*Betts v. Kimp-
ton*, 2 Bar. &
Adol. 273.

* Another important consequence of this unity of person is, that at common law a husband cannot make a grant to his wife. *Co. Litt.* 112, a. He may, however, grant to her, 1st, under the Statute of Uses, by granting the estate to another person for her use, *Co. Litt.* 112, a; 2ndly, by creating a trust in her favour, *Ib.*; 3rdly, under the custom of particular places, as the custom of *York*, *Bro. Custom*, 56; 4thly, he may surrender copyholds to her use, 4 *Rep.* 29, b; and, lastly, he may give an estate to her by his will, *Lit. s.* 168, *and comment.*

[† A *chose in action* may be defined as that species of personal property (not being chattels real) to which the beneficial *right* is in one person, while the *possession* is in another, and for the recovery of which the beneficial owner may be driven to action or suit.]

Co. Litt. 351. before his wife's death. The chattels real of the wife in possession, whether legal or equitable, devolve upon the surviving husband by marital right; and he is not obliged to take out administration, in respect of them, as he must to possess himself of her *choses in action*. But if the wife is entitled only to a *reversionary* interest in chattels real, as where a term is vested in trustees in trust for *A.* for life, and after his decease, in trust for *B.*, a married woman, and she dies in the lifetime of *A.*, the better opinion seems to be that her interest never having vested in possession, though vested in interest, must be considered in the nature of a *chose in action*, and that the husband, to complete his title, must take out administration to her.*

* 1 *Roll. Abr.* 345, pl. 40. *Co. Litt.* 351, a., 46, b. 2 *Eq. Cas. Ab.* 138, pl. 4. *Allyn. R.* 15. 2 *B. & Adol.* 273. 1 *Prest. Abst.* 343. *Toll. Ex. Ed.* 1806, 216-7. *Wan v. Lake, Gilb. Eq. Rep.* 234. For instances where it has been doubtful whether the husband or wife survived, see 2 *Phill.* 261-279. 1 *Curteis*, 595-6-705. See also *Wiltshire v. Rabbits*, 8 *Jurist*, 769, where an important distinction is laid down between chattel interests and *choses in action*.

The student will find the law of real property, arising from the relation between husband and wife, discussed at large in the late *Mr. Roper's* valuable Treatise on that subject.]

CHAP. III.

OF A FEME COVERT.

A *fême covert* may accept an estate ; and it shall be good till avoidance.* But *her conveyance* [was, previously to the statute 3 & 4 W. 4, c. 74,] absolutely void and not merely voidable, except it were by matter of record. She could only be bound by fine, recovery, or Act of Parliament. 2 Bl. Comm. 292. Touchst. 232. Ante, 401—3, text.

[But now by the above statute, fines and recoveries are abolished, and more simple modes of assurance substituted. The 77th section enables any married woman (not being tenant in tail for whom provision is before made by the act), with the consent of her husband to dispose of lands or money subject to be invested in the purchase of lands of any tenure (but with an exception of

* Her husband, however, may disagree thereto, and divest the whole estate ; but even if the husband agrees to the conveyance, the wife may waive it after his death ; and so may her heirs, if she dies during coverture, or even if she dies after her husband's decease, provided she has not, when free from coverture, done any act expressive of her assent thereto. Her consent during coverture is nugatory. *Co. Litt.* 3, a.

copyhold in certain cases), and to release any estate which she alone, or which she and her husband in her right, may have therein ; and also to release or extinguish any power reserved to her, as fully as she could do if she were a *fême sole* : but the powers of disposition conferred by the act are not to prevent the exercise of any other powers vested in her, independently of the acts, except so far as any such powers may, by disposition under the acts, be suspended or extinguished (s. 78).

Every deed of disposition by a married woman by virtue of the act, except she merely consent as protector, must be acknowledged (s. 79), by her as her act, before a Judge of one of the superior Courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, (ss. 81, 82), or two special commissioners (s. 83), appointed according to the provisions of the act : and she must be separately examined (s. 80), and a memorandum of such acknowledgment by the person taking it, must be made upon the deed, either indorsed, or at the foot, or in the margin (s. 84). The sections 84 to 89, inclusive relate to the form, filing, effect, indexing, and copies of, certificates of acknowledgment,* and the power of the Court of C. B. in reference thereto.

* [2 *Bing. N. S.* 268, 435, and see *Statutes, infra.*]

By section 90, provision is made for the separate examination of a married woman in the surrender of an equitable interest in copyhold, in the same manner as if the surrender were of a legal estate. By the following section (91), the Court of C. B. is authorized in certain cases to dispense with the concurrence of the husband,* but not to extend to those cases where the Lord Chancellor, Lord Commissioners, &c., and the Court of Chancery are the protector in lieu of the husband.

The 4 & 5 W. 4, c. 92, for abolishing fines and recoveries in *Ireland*, with a few alterations, is an echo of the above statute. The Irish act, of course, omits those clauses in the English act which are not applicable to *Ireland* relating to the tenure of ancient demesne and to copyholds. In section 68 of the Irish act corresponding with section 77 of the English act, the word 'disclaim' is introduced to obviate a question whether, under the latter section, a married woman trustee may disclaim.†

Secs. 4, 5, 6, & 50, 54, 66, 76, 90.

She may be seised to an use.

Sand. Uses, 88.

The husband and wife, however, may together make leases of the wife's lands for three lives

2 Bl. Comm. 318. Bac. on Leases, (C).

* [*Ex parte, Mary Gill*, 1 Bing. N. S. 168. 7 Cru. Dig. Appendix. *Shirley, ex parte*, 7 Dowl. 258.]

† [7 Cru. Dig. Appendix, 12—13.]

or a certain number of years, by the statute
32 *Hen.* 8, c. 28.*

*Powell on
Powers*, 31. 42.
Harg. n. (6)
to *Co. Litt.*
112, a.

A power may be given to a married woman :
and if a power be given to a *fême sole* which
it is intended she should execute though she
afterwards marry, it should be expressly said
“ whether sole or covert.”†

So a married woman may be enabled to dis-
pose of her property, by limiting such property
to her *separate use* ; in which case she shall be
considered in equity as a *fême sole*.‡

1 *Ves.* 303.
518. 3 *Bro.*
C. C. 8. See
also *Hulme v.*

Tenant, 1 *Bro.* C. C. 16. *Pybus v. Smith*, 3 *Ibid.* 340. *Burnaby v. Griffin*, 3 *Ves.* 266.
See also *Mores v. Huish*, 5 *Ves. jun.* 692, which though determined by the same Chancellor
as decided *Burnaby v. Griffin*, may not perhaps be very easily reconciled with the latter
case. See the *Introduction*.

* If the requisites of that statute are not complied with,
the lease is only voidable, not actually void ; and if she
receive rent after her husband's death, the lease will be
thereby confirmed. *Doe v. Weller*, 7 *T. R.* 478.

† It is clearly settled, that a married woman may exercise
a power simply collateral, though no special words are used
to dispense with the disability of coverture ; and that, if there
be an express dispensation with the coverture, she may
exercise powers coupled with an interest ; but with regard to
powers coupled with an interest, where the coverture is not
expressly dispensed with, there is no decision on the point ;
the prevailing opinion, however, is, that she can exercise
such powers also ; *et vide* 1 *Sugd. Pow.* 185, 194, *Ed.* 6.
1 *Prest. Abstr.* 340. *Harg. Co. Litt.* 112, a. n. 6.

‡ The case of *Mores v. Huish*, cited by Mr. Watkins in
the margin, if not expressly overruled, has been so repeatedly
contradicted by subsequent cases, that it can no longer be
quoted as an authority. It is now established beyond all

So the husband on marriage may give the wife power to make a will, and it shall be good.

[The restraint upon the power of alienation which is allowed in the instance of a life or other less interest in real or personal property, settled by deed or will upon trust for a married woman, is an exception to the rule of law, that property cannot be conferred without its incidents, among which is the power of alienation. This exception, however anomalous, is well established; and upon the ground that the power of alienation given to a *fême covert* is a mere creature of equity, to the extent to which the instrument constitutes her a *fême sole*, so, therefore, the Court may modify that power of alienation.*

Parkes v. White, 11 *Ves.* 221. *Sockett v. Wray*, 4 *Bro. C. C.* 483. *Jackson v. Hobhouse*, 2 *Mer.* 483. 487.

doubt, that a married woman is to be considered as a *fême sole* as to property given to her *separate use*, except in so far as her power over that property is restrained by the [instrument creating the power. *Wagstaff v. Smith*, 9 *Ves.* 520. *Parkes v. White*, 11 *Ves.* 209. *Witts v. Dawkins*, 12 *Ves.* 501. *Essex v. Atkins*, 14 *Ves.* 542. *Et vide, ante*, p. 403.]

* Attempts have frequently been made, but without success, to extend this restraint upon alienation to other persons. *Brandon v. Robinson*, 18 *Ves.* 433. *Ross v. Ross*, 1 *Jac. & Wal.* 154. *Graves v. Dolphin*, 1 *Sim.* 66. *Phipps v. Lord Ennismore*, 4 *Russ.* 131. *Green v. Spicer*, 1 *Russ. & Myl.* 395. *Newton v. Reid*, 4 *Sim.* 141. *Snowdon v. Dales*, 6 *Ib.* 524. [*Jones v. Wise*, 2 *Keen*, 285.] And a distinction has long been recognised between a condition restraining alienation, and a limitation confining the extent

¹ *Beav.* 1.

[Until the recent case of *Tullett v. Armstrong*, decided by *Lord Langdale*, M. R., and subse-

of the interest itself, and upon alienation or attempt at alienation, giving over the interest to another; so that a gift to *A.* until he alienate was good, but in a gift to *A.* for life, with a condition restraining his power to alienate his life interest, the condition was void. 18 *Ves.* 433. It is immaterial whether the alienation be by act of law or by act of the party. *Cooper v. Wyatt*, 5 *Mad.* 482. *Cooper*, 259. 2 *Wils. C. C.* 47. 6 *T. R.* 684. 2 *East*, 481. 13 *Ves.* 405. [More recent decisions suggest a modification of the above rule, that in a gift to *A.* for life, with a condition restraining the alienation of his life interest, the condition is void; for it seems to be now settled by a train of authorities, that where property is given to *A.* for life, with a proviso or condition to determine his life interest in the event of his alienating or becoming bankrupt, and there is a clear gift over during *A.*'s life to other persons, in that case the proviso is valid against the assignee or creditor of *A.* *Lewes v. Lewes*, 6 *Sim.* 304. *Brandon v. Ashton*, 2 *Yo. & Col. C. C.* 24. 7 *Jurist*, 10. But where the limitation over is substantially a provision for *A.*, whether through the instrumentality of a discretionary power in trustees or otherwise, it will be invalid, and the assignee or creditor of *A.* will be entitled during his life. *Piercy v. Roberts*, 1 *Myl. & K.* 4. *Snowdon v. Dales*, 6 *Sim.* 524. The same rule holds as to *A.*'s share, where the gift over is substantially for the benefit of him jointly with other persons; for there his share will belong to his assignee or creditor. *Rippon v. Norton*, 2 *Beav.* 63. *Page v. Way*, 3 *Ib.* 20. *Kearsley v. Woodcock*, 3 *Hare*, 185: and it would seem, in the latter case, immaterial whether the form of the gift be to *A.* until alienation, &c. or to him for life with a determining proviso. But in *Godden v. Crowhurst*, 10 *Sim.* 642, a case resembling *Rippon v. Norton*, *Sir L. Shadwell*, V. C., considered that the trust for the benefit of the bank-

quently confirmed, after much consideration, by *Lord Cottenham*, C., great difference of opinion prevailed, respecting the validity and effect of the trust for separate use, and the clause in restraint of alienation, by which that trust was frequently accompanied. The general opinion was that, although the trust for separate use was valid, in its inception, even when the *fême cestui que trust* was not under coverture at the time the instrument creating the trust came into operation, yet that the clause restraining alienation was in that case nugatory. It was, however, settled that the trust for separate use, as well before the coverture of the *cestui que trust*, as after it had ceased, was ineffective; leaving her at liberty to alienate,

4 *Myl. & C.*
377.

[*Barton v. Briscoe*, Jacob, 603. *Jones v. Salter*, 2 *Russ. & Myl.* 208. *Newton v. Reid*, 4 *Sim.* 141. *Woodmeston v. Walker*, 2 *Russ. & Myl.* 204. *Brown v. Pocock*, *ib.* 212. 5 *Sim.* 663. *Malcolm v. O'Callaghan*, cited 4 *Myl. & Cr.* 399.]

rupt, his wife, and children, was to be applied by the trustees for the benefit of all parties collectively and not distributively, so that the assignee was not entitled to the bankrupt's share, and see *per Wigram, V. C.*, in *Kearsley v. Woodcock*, and *Wetherell v. Wilson*, 1 *Keene*, 80. The case of *Rippon v. Norton* is clearly distinguishable from *Twopenny v. Peyton*, 10 *Sim.* 487; there, by codicil revoking the life interest to *A.* given by a prior will, and, reciting that *A.* had become bankrupt, the testator directed the trustees to apply such part of the income, as they should deem expedient, for the maintenance and support of the bankrupt, and for no other purpose; and the same judge decided that the trust was good against the assignees of *A.* In the cases of *Shee v. Hale*, 13 *Ves.* 404; *Cooper v. Wyatt*, 5 *Mad.* 482; *Lear v. Leggett*, 2 *Sim.* 479, and *Pym v. Lockyer*, 12 *Sim.* 394, the question was, whether in the events which happened there was a forfeiture of the life estate?

without reference to the trust, and that, the restraint upon alienation also ceased, when the *cestui que trust* became *discoverte*.

In *Massey v. Parker, Lord Cottenham*, then Master of the Rolls, expressed an opinion, which is now overruled, that the marriage of a *fême covert* who was entitled to a fund for her separate use, was by itself, a gift of that fund to the husband. But if, at the time of the marriage, she was an infant, her infancy precluded the inference of intention to give the fund. Where the husband on his marriage confirmed the trust for the separate use of his wife, of course, it would have continuance, during the coverture.

2 Myl. & K.
174.

Johnson v.
Johnson, 1
Keene, 648.

Maber v.
Hobbs, 2 Yo.
& Col. 317.

The case of *Tullett v. Armstrong*, as confirmed by *Lord Cottenham, C.*, seems now to have settled this much agitated subject; and it established a doctrine differing from that, which, as above stated, seems, according to the more general opinion, to have been received as law. That case in conformity with the decision of *Lord Lanydale*, has placed the trust for separate use, and the clause restraining alienation, upon the same footing; and has given to each the same validity, the principle upon which they are to be supported being identical, both resting upon the power of the Court of Chancery to model, and qualify the interest in property, which it had itself created. It may now, therefore, be considered established

that the trust for separate use, and the clause restraining alienation, are equally valid in their inception, whether the *fême cestui que trust* be *sole* or *covert* when the instrument, by which they are created, comes into operation; that practically, those protective provisions have operation only during the coverture of the *cestui que trust*; that neither clause has any efficacy, while the donee is single, but that they will revive upon a subsequent marriage, if nothing is done, beyond the mere act of marriage, to alter the original trust.*

See also *Scarborough v. Bor-*
man, 4 *Myl. &*
Cr. 378.

Independently of the question finally settled by *Tullet v. Armstrong*, respecting the clauses for separate use and in restraint of anticipation, recent decisions have created no little perplexity in their construction, more particularly as regards the form, position, and extent of the words employed to restrain anticipation. The cases of *Barrymore v. Ellis*, *Brown v. Bamford*, and *Medley v. Horton*, have, it is submitted, by a verbal criticism of the separate parts of those clauses when combined, defeated the obvious intention of the settlors, and this, in opposition to the general opinion and practice of the Profession.†

8 *Sim.* 1.
11 *Ib.* 127.
8 *Jurist*, 853.

* See also *Davies v. Thornycroft*, 6 *Sim.* 420. *Anderson v. Anderson*, 2 *Myl. & K.* 427.

[† It has been, for at least half a century, the general opinion of conveyancers, their practice being in conformity with that opinion, that it was immaterial, in what part of the various

In *Barrymore v. Ellis*, the trust was to pay an annuity, during the joint lives of the husband and wife, to such persons, &c. as the wife by writing under her own hand should appoint, but not so as to anticipate; and, in default of such appointment, to pay the same to her for her separate use. *Sir L. Shadwell*, V. C., held the restraint attached only to the power, and that the wife had an unfettered control over her life interest; that although she could not alienate by an exercise of her power, she could by an assignment of her life interest; so that, virtually, the restraint was nugatory. In *Brown v. Bamford*, the dispositions were by will, substantially the same as in the preceding case, and the same Judge made a similar decision. In the still later case of *Medley v. Horton*, the trust was, in a will, to pay the produce of a fund, during the life of a married woman, to such persons as she should under her hand authorize to receive the same; and in default of such appointment, into her proper hands for her separate use, the receipt

forms of trusts for separate use, the words in restraint of alienation were inserted; it being understood that the insertion of those words in any part of the trust, was sufficient to indicate the intention of the settlor, against any alienation of the life interest of the *feme covert*; and that that obvious intention governed the whole clause, as well the power, as the interest: it was also understood to be the object of the power, merely for convenience, to authorize the *feme covert* to appoint an attorney to receive the accruing income.]

of herself, or of such person as she might authorize to receive the same, to be alone a good discharge; the trustees being always at liberty to require from her, a separate authority or receipt for each quarterly payment; it being the intention that the annual interest should not be sold, charged, or otherwise disposed of. *Sir L. Shadwell*, V. C., decided that the restraint was altogether nugatory: his Honor being of opinion that the principal case was quite distinct from *Barrymore v. Ellis* and *Brown v. Bamford*, but was consistent with *Acton v. White*; and that the disposition amounted to a general power of appointment first given, with a general restraint upon alienation; which was void according to the known rule, that where there is a gift of the fee, and a subsequent declaration, that the donee shall not alienate, the declaration goes for nothing.* Between the decisions of *Brown v. Bamford* and *Medley v. Horton*, the case of *Moore v. Moore* (in substance resembling the former of those cases) has been decided by *Sir Knight Bruce*, V. C., in which his Honor held, in accordance with the general opinion of the Profession, that the restraint attached as well to an exercise of the power, as to an assignment of the interest: his Honor observed that there was some difference between the words in that case, and those of *Barrymore v. Ellis* and *Brown v. Bamford*. It is submitted that the difference is

1 *Sim. & St.*
429.

8 *Jurist*, 139.

* See *Baggett v. Meux*, 8 *Jurist*, 391. 1 *Coll.* 138.

merely verbal, and that the cases in substance so nearly resemble each other, that it is scarcely possible to come to any other conclusion, than that a conflict of judicial opinion exists upon the point under discussion. The material difference between the cases appears to be one of form, in *Medley v. Horton*, the restraining words followed both the power and the trust for separate use, while in *Brown v. Bamford* and *Moore v. Moore*, they followed the power. The case of *Brown v. Bamford* has been heard on appeal, before the Lord Chancellor, but his Lordship has not yet delivered his judgment.

12 *Sim.* 615.

The law also imposes an anomalous restraint, during coverture, upon the alienation of reversionary interests of married women in personal property. This, however, was not free from doubt until the case of *Purdew v. Jackson*, followed by *Honner v. Morton* and many subsequent cases; and it was carried to its full extent in the recent case of *Stiffe v. Everitt*, where *Lord Cottenham*, C. virtually decided that husband and wife could not effectually dispose of the wife's life interest in a fund not settled to her separate use, beyond the duration of the coverture.*

1 *Russ.* 1.

3 *N.* 65.

1 *Myl. & Cr.*
37.

* [In that case a fund was bequeathed to trustees in trust for the separate use of the testator's daughter for life, with a clause against the anticipation of her life interest, but with a power of appointing by deed or will the capital after her

A doubt has been suggested whether the recent statute 7 & 8 *Vict. c. 76, ss. 2 and 5*, aided by the interpretation clause, sect. 1, removes the restraint above-mentioned, by enabling married women to assign their reversionary interest in a personal fund, whether vested or contingent. The better opinion seems to be, that the Legislature only intended, by sections 2 and 5, to facilitate the transfer of certain estates and interests, which, before the act, were not alienable at law, but not to remove any disabilities affecting the owners of those estates and interests. It is conceived that the 5th section applies to married women, in reference to those estates and interests

decease. The daughter was unmarried at the death of the testator: she subsequently married, and with her husband petitioned to have the fund transferred to him; and, if required, she agreed to make an absolute appointment. *Lord Cottenham, C.* refused to make the order, observing, that, consistently with *Purdew v. Jackson* and *Honner v. Morton*, he did not see how the husband could make a title to the dividends of the fund which might accrue after his death, during the life of the wife surviving. His Lordship's decision appears to be perfectly correct in principle, and in conformity with the authority cited in *Com. Dig. Baron & Fême* (K.) and referred to in the note to the principal case, p. 41, but, it is submitted, that that principle was not applicable to the case before him, because the life interest of the wife was in trust for *her separate use*; which, according to the authority of *Davies v. Thornycroft*, 6 *Sim.* 420, was valid, although the restraint upon alienation was not; and consequently the petitioner had the power of assigning her life interest as a feme sole.]

3 & 4 W. 4,
c. 74, ss. 77,
&c.

only, which, at the passing of the act, they had power to alienate; such, for instance, as they could convey under the Fine and Recovery Act; but that it does not apply to those in respect of which they were then under disability; and of this description were their reversionary interests in a personal fund.

The language of 13th clause, limiting the operation of the act, is far from perspicuous, but it would seem to exclude from the operation of the 5th section, at least, (a) estates and interests created before the 1st of *January*, 1845. (b)]

Major v. Lans-
ley. 2 *Russ.* &
Myl. 355.

If, however, the reversionary interest in the trust fund be settled upon the *fême sole* for her separate use, in the absence of the clause against alienation, she is of course competent to assign her life interest during the coverture.*

(a) [To construe the 13th section to the full extent which its literal import might admit, would, in a great measure, defeat the act.

(b) The student is reminded that the observations made in the Chapters on Remainder, Right and Possibility, *supra*, respecting the conveyance of contingent interests, must be read with such reservation as the doubtful meaning of the 13th section of the above act requires.

Ubi supra.

* In *Stiffe v. Everitt*, Lord Cottenham, C. observed, when the case came before him as Master of the Rolls, that the cases left it unsettled, where an annuity or life interest in a fund was given to a married woman, *and not settled to her separate use*, whether the husband with the wife's concurrence was

The husband, however, has power to assign any reversionary interest of his wife in her chattels real whether contingent or vested; unless settled to her separate use.

Donne v. Hart,
2 *Russ. & Myl.*
360. *Ib.* 365.
6 *Sim.* 426—7.

Where trust funds are settled upon trust for the separate use of a married woman, without words restraining alienation, and after her decease, upon such trusts as she shall by deed or will, or by will only appoint, and in default of appointment to her *executors* and *administrators*, she may call upon the trustees to transfer the funds, and so abdicate her power.* If the trust were to her appointment by *deed*, and in default of appointment to her next of kin, there by an appointment by deed of the fund to herself or by an assignment of her life interest, with an ap-

Barton v.
Briscoe, *ubi*
supra. 15 *Ves.*
537, per *M. R.*
Wilson v.
Mount, 2 *Sim.*
& *Stu.* 493.
Smith v. Death,
5 *Mad.* 571.
Daniel v.
Dudley, 1 *Tur.*
& *Phil.* 1.

Lynn v. Ash-
ton, 1 *Russ. &*
Myl. 138.

capable of effectually disposing of her entire life interest, seeing she might outlive her husband; and then such part of her life interest, as would be enjoyed by her after his death, would be reversionary. It is remarkable that the case before his Lordship was, as before observed, one of *separate use*; though concurring with the arguments of the petitioner's counsel, he appears to have decided under the impression that the trust in the will for the *separate use* of the wife was void, as well as the clause in restraint of alienation: the argument adopted by the plaintiff's counsel removed the only ground upon which the application of their clients could be supported.

* See *Webb v. Lord Shaftesbury*, 3 *Myl. & K.* 599, where a similar decision was made in reference to real and personal property settled upon similar trusts.]

pointment of the fund to a third person the trustees may be called upon to transfer the fund. But if the trust were to her appointment by *will* only, and the ultimate trust to her *next of kin*, there she cannot make an immediate disposition of the fund. If she makes no appointment the next of kin of the donee, living at her death, will be entitled.]

Anderson v.
Dawson, 15
Ves. 532. 537.
 2 *Rop. H. & W.*
 215. 10 *East*,
 438. *Scott v.*
Davis, 4 *Myl.*
 & *Cr.* 87.

CHAP. IV.

OF THE KING.

GENERALLY, the King cannot either grant or take but by matter of record ; as by deed enrolled. He might *take* by *fine*, though he could not be a cognizor ; nor could he be a party to a recovery, for the King cannot be sued.

2 *Bl. Comm.*
346.
Com. Dig.
Grant (G.)
5 *Cru. Dig.*
115, ed. 4, 348.
Pig. 74. 12
East, 109, &c.
infra as to
statutes affect-
ing Crown
lands. 1 *Sand.*
Uses, 213,
4 ed.

Nor can the King be seised to an use.

But the King may assign certain things, as a *chose en action*, &c., [so as to enable the assignee to sue in his own name, which the subject cannot do.]

Com. Dig.
Grant (G.) &
Assignment
(D.)
[1 *Dy.* 1. 6.
Cro. Jac. 179.
The King v.
Irvine.]
Co. Litt. 372, b.
Moore, 342.
Sir H. Chol-
meley's case,
Pig. Rec. 85.
5 *Cru. Dig.*
p. 414. 422,
ed. 4.

A recovery by the subject will not bar an estate tail of the gift of the Crown as a reward for services ; nor if the estate tail be of the gift of the subject, [would it previously to the late statute 3 & 4 *W.* 4, c. 47, ss. 15, 19 (a),] bar or destroy any remainder or reversion in the Crown.*

(a) *Duke of Grafton v. L. & B. Railway Co.*, 5 *Bing. N. C.* 27.

* But it would bar the estate tail and remainders prior to the King's reversion, if those estates were not of the gift or procurement of the Crown : *et vide, antè*, p. 221, as to a case

where a reversion vested in the Crown by forfeiture. As to grants by the King, *vide infra*, statutes 39 & 40 *G.* 3, *c.* 88. [By the 15th & 19th sections of the statute 3 & 4 *W.* 4, *c.* 74, the powers of disposition conferred upon tenants in tail extend to the barring of all persons (including the King's most excellent Majesty his heirs and successors) whose estates are to take effect after the determination or in defeasance of an estate tail in respect of which the disposition shall be made in conformity with the act; not being given as reward for services; for the eighteenth section provides that the power of disposition given by the act, shall not extend to tenants in tail who, by the statute 34 & 35 *H.* 8, *c.* 20, an act to embar feigned recovery of lands wherein the King is in the reversion, or by any other act, are restrained from barring their estates tail.]

CHAP. V.

OF THE QUEEN.

THE Queen may alien and purchase without the concurrence of the King. She might have levied a fine, as any other subject ; but it is said, that she cannot be seised to an use.*

1 *Bl. Comm.*
220. *Touchst.*
233. 5 *Cru.*
Dig. 116, ed. 4.
1 *Sand. Uses*,
214, ed. 4.

* By the common law a Queen consort is considered as a *feme sole* ; and by the stat. 39 & 40 *G. 3, c. 88*, she is still further enabled, by writing under her hand and seal, to convey any real estate purchased by or in trust for her ; but she is prohibited from disposing of any palace, belonging to the King in right of the Crown, vested in her for life. As the Queen cannot stand seised to an use, she cannot convey by lease and release as such, or by a bargain and sale, or a covenant to stand seised ; but each of those instruments being under her hand and seal, would operate as a conveyance by virtue of the above-mentioned statute. As a *feme sole*, a Queen consort may make a will.

CHAP. VI.

OF CORPORATIONS.

OF their capacity to take. See 1 *Bl. Comm.* Chap. 18. 478-9.*

Davy's Rep.
44, b.

Grants by Corporations must be by deed under their common seal ; and such deed, so sealed, is good without delivery.

1 *Salk.* 192.

But they may bind themselves by a matter of record without their seal.

*Coke's Read. on
Fines, Read. 7
& 8. 5 Cru.
Dig. 131, ed. 4.*

Corporations *aggregate* could not levy a *fine*, as they can only appear by attorney, and a fine must have been levied in person ; though it is said that a corporation *sole* might be a cognizor, for he might appear personally : but corporations of either kind might be *cognizees*.†

* Corporations may hold freehold lands transmitted to them by descent or succession, but they cannot purchase lands without the King's license, nor can they take by devise. *Vide infra*, stat. Mortmain.

† Corporations are either aggregate or sole, lay or ecclesiastical. *Aggregate* corporations, in a conveyance to them by license, take the fee without words of limitation ; and

But a corporation cannot be seised to an use; and therefore, it cannot make a bargain and sale.

See 1 *Sand. Uses*, 59, ed. 4, and *ante*, b. 1, c. 20.

And, consequently, if [previously to the stat. 7 & 8 *Vict. c. 76*,] a lease and release were made by a corporation, the instrument on which the release was grounded must not have had the words "*bargain and sell*," but those of "*grant and demise*;" as it must operate as a *lease*, strictly, and *not as a bargain and sale*; and on such lease *the lessee must have actually entered into the lands*; for, before entry, he could have no possession on which the release can operate.*

although they could not levy fines, yet might they be barred by the non-claim on a fine: they may also take a chattel in succession. A *sole* corporation cannot take the fee without the word "successors;" and the inclination of opinion seems to be, that a sole corporation might levy a fine, particularly a sole lay corporation, which may be bound by matter of record. A sole corporation cannot take a chattel or term in succession, except the King and the chamberlain of the City of London. *Ecclesiastical* corporations cannot alien their lands, nor would the non-claim on a fine run against them. *Lay* corporations may both alien their lands, and might bar or bind themselves by fine; consequently they would be bound by the non-claim on a fine. The subject of this note is more fully discussed in 4 *Cru. Dig.* 4 ed. p. 13. 5 *Ib.* 131, 171-2, 223.

* An exchange by an aggregate corporation is usually perfected by feoffment, livery being made by attorney. It may be effected by a lease with actual entry and release; but without the entry the release would in all probability be held

[But a lease for a year in the conveyance by lease and release being now dispensed with, whatever doubts may have existed whether corporations could convey by release, under the stat. 5 & 6 *Vict. c. 21*, it is now clear, that they may convey by a single deed, operating as a lease and release under the 7 & 8 *Vict. c. 76, ss. 1, 2*. Although previously to the latter statute, a feoffment was generally adopted as the most convenient form of conveyance by corporations, they, nevertheless, frequently conveyed by lease and release, the lease for a year being by common law demise; and no doubt was ever entertained of their power to convey in that form; so that they clearly come within the second section of the 7 & 8 *Vict. c. 76*, and by the first section the word “*person*” is made to extend to a *corporation* as well as to an individual.]

2 *Bl. Comm.*
320. 1 *Bac.*
Leases,
E. F. G. H.

Ecclesiastical corporations are restrained from aliening, except for certain terms, by statute.*

good as a grant, *that* being the only *instrument* that is necessary to effectuate an exchange, which is an assurance at common law. See *antè, Ch. Exchange*.

* By late acts they are enabled to exchange their lands for others of greater value or more conveniently situated. 55 *G. 3, c. 147*. 56 *G. 3, c. 52*.

[By the statute 1 & 2 *G. 4, c. 92*, corporations and other trustees, holding lands in trust for charitable purposes, are empowered, under the direction of commissioners to be appointed for the purpose by the Bishop of the diocese where the lands lie, and with the approbation of the Bishop, to exchange.]

OF THE LAW OF INHERITANCE.

[Considerable alterations having been made in the law of inheritance since the earlier editions of this work, the editor was induced to add the present chapter, to show the leading principles of that branch of the law of real property, as it is affected by the statute of the 3 & 4 *W.* 4, *c.* 106.

First, with respect to the descent of estates of inheritance in fee simple in *possession* ; *Secondly*, of estates of inheritance in fee simple in *remainder or reversion* ; *Thirdly*, of descent by *custom* ; *Fourthly*, descent of *estates tail*, or by statute.

1. Descent of estates of inheritance in fee simple in *possession*.

Descent or hereditary succession is the title by which the heir, on the death of the ancestor intestate, acquires his real estates, including heirlooms and other chattels annexed to the freehold. To constitute a person lawful heir, he must be legitimate, a natural born subject,* an alien naturalized by act of Parliament, or a denizen by the King's letters patent. Descent may, under certain circumstances, be traced through an alien.† But persons attainted for high treason, and, previously to the 54 *G.* 3, *c.* 145, for any kind of felony, could neither inherit nor transmit an inheritance to their children. By the latter act no attainder for felony, except for high treason, petty treason or murder, or for abetting the same,

* 7 *Ann.* *c.* 5. 4 *G.* 2, *c.* 21. 13 *G.* 3, *c.* 21. 4 *T.* *R.* 300.

† 11 & 12 *W.* 3, *c.* 6, explained by 25 *G.* 2, *c.* 39. *Cru. Dig.* 4 ed. p. 322.

shall disinherit any heir. The statute of 3 & 4 *W.* 4, c. 106, s. 10, enacts, that attainder, happening before the descent takes place, shall not interrupt the course of descent, unless the land shall have escheated in consequence of such attainder.

There are *seven* canons, or rules of descent, by which the law of descent was regulated previously to the above statute.

The *first* canon of descent is, that inheritances shall lineally descend to the issue of the person who last died seised *in infinitum*, but shall never lineally ascend. With respect to this canon the recent statute has made two material alterations in descents happening upon deaths on or after the 1st of *January*, 1834: the first by section 6, that lineal ancestors may inherit; and they come in next after the lineal descendants of the last proprietor; thus if *A.* dies intestate, and without issue, leaving a father, brothers and sisters, the father will take first, as heir to his deceased son, before the brothers or sisters: and the second that actual seisin is not necessary to make the ancestor the root or *propositus* from whom the descent is to be traced; but by the first and second sections of the act the descent is to be traced from the person last entitled to the land, whether he did or did not obtain actual possession, or the receipt of the rents and profits. Under the old law, an actual entry was necessary to gain an actual seisin; seisin in law or right of possession was not sufficient,* except where the ancestor acquired the estate by his own act, though he never had actual seisin of it:† as in an exchange, one party having entered, the exchange was complete, and if the other died before entry, his heir was in by descent; or where a party, having contracted for the purchase of an estate, died intestate before the estate was conveyed.‡ In the latter case the ancestor was in every sense the purchaser; and the same

* 1 *Inst.* 11, b. 15, a.

† 1 *Rep.* 98.

‡ 1 *Ves. s.* 437.

rules were and still are applicable to equitable as to legal estates.

The *second* canon is, that the male issue shall be admitted before the female; that is, a son before a daughter, an uncle before an aunt of the deceased; but his daughters shall succeed before his collateral relations. This canon is explained by the seventh section of the late act in the following words: "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until, all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The *third* canon is, that where there are two or more males in equal degree, the eldest only shall inherit, but the females all together;* this canon remains unaltered.

The *fourth* canon is, "That the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done, had he been living.† This canon remains unaltered; this is called succession *per stirpes*, according to the roots, from which it follows that the nearest relation is not always the heir-at-law, as the next cousin *jure representationis* is preferred to the next cousin *jure propinquitatis*.

The *fifth* canon was, that on failure of lineal descendants or issue of the person last seised, the inheritance should descend to his collateral relation, being of the blood of the

* 2 Bl. Com. 214.

† Ib. 216, 217.

first purchaser, subject to the three preceding rules;* so that where lands descended on the part of the father, none of his relations on the part of his mother could inherit them, but the lands should escheat, and *vice versâ*: this kind of inheritance could not be created by act of the parties.† But the course of descent might, even before the late statute, have been altered, by any act which constituted the owner a purchaser of the estate: as where *A.* seised in fee *ex parte maternâ* made a feoffment in fee to *B.*, and *B.* enfeoffed *A.* in fee, this was a new purchase.‡ So where a trust estate descended *ex parte maternâ*, and the legal estate *ex parte paternâ* to the same person, the legal estate governed the descent.§ But the word “*purchaser*” by the first and second sections of the late act, has obtained a much more extended import than it possessed before. The first section declares that the word “*purchaser*” shall mean the person who last acquired the land otherwise than by descent, or than by *any* escheat, partition, (*a*) or inclosure, by the effect of which the land shall have become part of, or descendible in the same manner as other land acquired by descent: and section 2 enacts that the person last entitled to the land (that is, who had a right thereto, whether he did or did not obtain the possession, or receipt of the rents and profits thereof) shall, for the purposes of the act, be deemed the purchaser, unless it can be proved that he inherited the same; and in that case the person from whom he inherited shall be the purchaser, unless it can be proved that he inherited the same; and so in like manner to the last person from whom the land shall be proved to have been inherited.|| By section 3, where lands

* 2 *Bl. Com.* 220.

† 1 *Inst.* 12, 13.

‡ 1 *Inst.* 12, b. 1 *Atk.* 480.

§ 2 *Doug.* 771. 1 *Sim. & Stu.* 45.

(*a*) [*Doe v. Dixon*, 5 *Adol. & Ell.* 834.]

|| Suppose *A.* and *B.* brothers of the whole blood; *B.* has

are devised by any testator dying after the 31st of *December*, 1833, to the heir, the heir shall take as a devisee, and not by descent; and so where lands shall be conveyed after that day to the grantor or the heirs of the grantor, he shall be considered to have thereby acquired the same by purchase, and shall not be in of his former estate. Where, however, the grantor conveys a partial interest, and the use results, he will, as to that, be in of his former estate.

The *fifth* canon is also materially altered in regard to collateral descent; for by the sixth section before noticed, the lineal ancestor is preferred to collaterals.

The *sixth* canon was that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood:* thus if *A.* had a son *B.* by one wife, and *C.* a son by another, and *B.* purchased land in fee simple, and died without issue, *C.*, his brother of the half blood, would not

two sons, *C.* and *D.* by different wives; *C.* purchases an estate and dies intestate, and without issue, before the passing of the above act; *A.* his uncle would be his heir, and not *D.* his half brother. *A.* thus taking by descent from *C.* dies intestate, after the passing of the act, leaving *E.* his son and heir; as the estate must descend to the heir of the last purchaser, who will be *D.* the brother of *C.* by the half blood, he will be entitled to the exclusion of *E.* the son of *A.*: this hardship is not provided for by the act. If *A.* had executed a conveyance so as to vest the estate in himself as a purchaser, under section 3 of the late act, his son would have inherited.

So where *A.* purchases and dies intestate, leaving three daughters *B.* *C.* and *D.*, his co-heirs; *D.* dies intestate, leaving *E.* her son and heir, who then becomes entitled to one-third, instead of the whole of his mother's share, that is, one-ninth instead of one-third; because, under the second section of the act, the heirs of *A.* (the purchaser,) would be his two daughters *B.* and *C.* jointly with *E.* the son of *D.*

* 2 *Bl. Com.* 224.

inherit as heir to *B.* but the uncle of *B.*; or if *A.* had not only *B.* a son by his first wife, but *D.*, a daughter, *D.* would be heir to her brother, for *possessio fratris facit sororem esse hæredem*. But if, in the last case supposed, *A.* died seised in fee, and *B.* died before entry, and without issue, *C.* shall inherit as heir to his father. In such cases the important inquiry was, whether the heir acquired such a *seisin* as by law was required to make him a stock of inheritance. The following were circumstances which conferred this *seisin*, or what was equivalent thereto, namely, entry or claim,* or the possession of a termor for years,† the possession of one of several tenants in common,‡ of a guardian in socage.§ But now in cases of descent taking place upon deaths happening on or after the 1st day of *January*, 1834, the above canon is materially altered. By the fifth section of the above act, it is enacted that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. And by section 9, the half blood are admitted to the inheritance, and next in order after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father and their issue; and the brother of the half blood on the part of the mother shall inherit next after the mother: the reason for the variation in the latter case being, that in tracing the descent to a brother of the half blood on the part of the father, the brothers and sisters of

* 1 *Leon.* 265.

† 1 *Inst.* 15, a. 3 *Rep.* 41, b.

‡ *Small v. Dale, Moore*, 868.

§ 1 *Inst.* 15, a, & 14, b. *Prec. in Cha.* 280. 3 *Wils.* 516, 517. 7 *T. R.* 386.

the whole blood have been previously let in to the inheritance, as will be seen by the annexed Table of Descents, II.*

The *seventh* and last canon is, that in collateral inheritance, the male stocks shall be preferred to the female, that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near; unless where the lands have, in fact, descended from a female :† for a further explanation of these canons the reader is referred to the annexed Tables of Descent; the first tracing the line of descent according to the canons before the late act, and the second, the mode of devolution of the heirship as altered by that statute. Until that statute it was an unsettled question whether No. X. in the first Table of Descents should be preferred before No. XI.; that is to say, whether the male branches or descendants of the male stock of the *propositus* being exhausted, the brother or sister of the paternal grandfather's mother, No. X., should be preferred before the brother or sister of the paternal grandmother's father, No. XI. *Sir William Blackstone* defends his preference of the former, *Mr. Cruise* advocates the opinion in favour of the latter. The act, by section 8, settles the question in favour of No. X. The annexed Table, No. I., traces the descent according to *Sir William Blackstone's* system by the numeral letters, and *Mr. Cruise's* by the figures.

II. We proceed to offer a few remarks on the descent of estates in fee simple *in remainder or reversion*. The canons or rules of descent before considered respecting estates in possession did not, previously to the late act, apply to estates in remainder or reversion expectant on an estate of freehold; because the actual seisin was in the freeholder; neither are those rules now applicable to descents which took place upon deaths happening before the 1st of *January*, 1834.

* 3 *Cru. Dig.* ed. 4, p. 343.

† 2 *Bl. Com.* 235.

The descent, therefore, of inheritance in fee, in remainder or reversion, was traced to the first purchaser; and when the remainder or reversion came into possession by the determination of the preceding freehold, it would devolve upon the person who at that period was the heir of the first purchaser;* consequently the half blood were admitted.† It should, however, be observed, that acts of ownership over the remainder or reversion were deemed equivalent to actual seisin, and constituted the person exercising such acts a new stock.‡ By the first section of the above statute it is enacted that the word “land” shall extend to hereditaments corporeal and incorporeal, and of every tenure, and every interest capable of being inherited, and whether in possession, reversion, remainder, or contingency; from which enactment the law of inheritance is the same with respect to estates in possession, in remainder, or in reversion.

III. Descent by *custom*. The principal modes of customary descent are, gavelkind, borough-English, and copyhold, all of which are affected by the stat. 3 & 4 W. 4, c. 106.

The descent of gavelkind lands is to all the sons equally, and in default of sons to the daughters in like manner; but females representing males, may inherit with males: § this species of descent extends also to the collateral line, and to limitations in tail, the sons of tenant in tail inheriting equally, as heirs of the body. || The exclusion of the half blood takes place in gavelkind lands,** only in cases of descent occurring on deaths before the 1st day of *January*, 1834. ††

* 1 *Inst.* 14, n. 6. 2 *Wils.* 45. 3 *Bos. & Pul.* 658. *Fearne, C. R.* 561, 6 ed.

† 1 *Inst.* 14. 1 *Roll. Ab.* 628, pl. 7, 8, 9.

‡ 1 *Inst.* 15, a. 8 *Rep.* 35, b. 9 *Mod.* 363.

§ *Rob. Gav.* 113, ed. 1822.

|| *Ib.* 115, 119.

** *Ib.* 131.

†† 3 & 4 W. 4, c. 106, s. 9.

2. Descent of borough-English lands is to the youngest son, and is applicable also to the descent of estates tail:* the right of representation also takes place in borough-English lands; so that if the youngest son dies in his father's lifetime, leaving an only daughter, she will inherit on the decease of the grandfather.

This custom does not extend to collaterals;† so that if the lands descend to the younger brother, and he dies without issue, the lands will descend to the eldest brother: but *Lord Coke* has said that by some customs the youngest brother shall, in the above case, inherit.

The above and other customary descents cannot be altered by act of the party; as where *A.* seised of lands in borough-English, enfeoffed *B.* and the heirs male of his body according to the course of the common law, the latter words were held void.‡

3. With regard to lands held by copy of Court roll, the descent is governed by the custom of the manor; but in general it is the same as that of lands held in socage.§ The heir of the copyholder, however, is not complete tenant to the lord until admittance;|| but where the customary descent differs from the common law, the custom is construed strictly.**

With regard to copyhold, as to other customary lands, the statute of 3 & 4 *W.* 4, does not alter the custom by which the descent of the lands is governed, except so far as its enactments are applicable to them in common with land of freehold tenure.

* *Lit. s.* 165. 1 *Inst.* 110, b. n. 3.

† *Rob. Gav.* 118. *Cro. Jac.* 198.

‡ 2 *Dy.* 179, b. *Jenk. Cen.* 5, *Ca.* 70.

§ 2 *Ld. Raym.* 1024. 1 *P. Wms.* 63. 1 *Roll. Abr.* 623. *Co. Cop.* 41, 50.

|| 4 *Rep.* 23, b. *Co. Cop.* 41.

** 2 *Ld. Raym.* 1025. 4 *Leon.* 242. *Cro. Car.* 410.

1 *T. R.* 166. 5 *Ib.* 26. 12 *East,* 62.

IV. The descent of *estates tail* is not affected by the late statute ; but it is regulated by the statute *de donis conditionalibus*,* and therefore it is called descent by statute.

The descent of an estate tail must be traced to the first purchaser or donee, and through that description of heirs which is specified in the original gift : so that in tracing the descent to an estate tail the maxim *seisina facit stipitem* does not apply :† so, consequently, there is no exclusion of the half blood in the descent of an estate tail ; for the issue in tail are always of the whole blood of the donee.‡ Neither is the descent of an estate tail interrupted by attainder, for the issue in tail claim *per formam doni*, and such issue are as much within the intention of the gift, and as personally described in it, as the ancestor.]§

OF DISTRIBUTION ACCORDING TO THE STATUTE
22 & 23 CAR. II. C. 10, OF THE PERSONAL EF-
FECTS OF A PERSON DYING INTESTATE.

[It should be observed in the first place, that the above statute does not extend to the estate of a married woman ; so that the husband takes the whole of her personal effects, he being entitled by the common law to administer to his deceased wife,|| and that relations of the half blood take with those of the whole blood in equal degree.**

* 13 Ed. 1, c. 1.

† 3 Rep. 41, b. 1 Ves. s. 364.

‡ 8 T. R. 213.

§ 3 Rep. 10. Cro. Eliz. 28. 8 Rep. 165, b.

|| Cro. Car. 106. 29 Car. 2, c. 3, s. 25. 2 Bl. Com. 515, ante, 427. Squib v. Wyn, 1 P. Wms. 379. Elliot v. Collier, 3 Ath. 526.

[** 2 Freeman, 289, 294. Ed. 126. 1 Ves. s. 156.]

If the intestate leaves a widow and children, the widow takes one-third; and the children take the remaining two-thirds equally.*

Widow and children.

If he leaves a widow and no children, she takes a moiety,† and the next of kin, the other moiety, as after mentioned.

Widow.

If he leaves a widow, but neither children nor next of kin, she only takes one moiety, and the Crown the other.‡

If he leaves no widow, the entirety is distributable among his children equally;§ and if he leaves but one child, it devolves upon such only child.

Children.

If some of the children of the intestate die in his lifetime, leaving children, such children or their lineal representatives *in infinitum* take *per stirpes* equally.||

Children and the representatives of children.

If all the children of the intestate die in his lifetime, leaving children, such grandchildren, or, if all of such grandchildren die in the lifetime of the intestate, leaving children, then all such great-grandchildren take equally *per capita*, claiming in their own right and not by representation.**

Grandchildren, &c.

If all the children of the intestate die after his decease, but before distribution is made, their shares vest at the decease of the intestate;†† and their lineal representatives *in infinitum* take *per stirpes* equally.

Vesting of distributive shares.

Where distribution is made among the children of the

Hotchpot.

* Sec. 5 of the stat. *Palmer v. Garrard*, *Prec. Cha.* 21.

† Sec. 6 of the stat.

‡ *Cave v. Roberts*, 8 *Sim.* 214.

§ Sec. 7 of the stat. *Watts v. Crooke*, *Show. P. C.* 108. *Burnet v. Mann*, 1 *Ves. sen.* 156. *D'Avers v. D'Ewes*, 3 *P. Wms.* 49.

|| Sec. 5 of the stat. *Pett's case*, 1 *P. Wms.* 27. *Stanley v. Stanley*, 1 *Atk.* 457.

** *Walsh v. Walsh*, *Prec. Chan.* 54. *Bowers v. Littlewood*, 1 *P. Wms.* 593. *D'Avers v. D'Ewes*, 3 *P. Wms.* 50.

†† *Edwards v. Freeman*, 2 *P. Wms.* 442. *Grice v. Grice*, 3 *P. Wms.* 49, note D.

intestate, such children (excepting the heir-at-law) * must bring into hotchpot any advancement made by the intestate in his lifetime.†

Lineal descendants.

The lineal descendants of the intestate *in infinitum* are preferred to all ascendants or collaterals.‡

Neither wife, child, nor descendant of child.

If the intestate leaves neither widow, child, nor descendant of child, the next of kin are entitled; § that is, the father if living, takes the whole: but if dead, the mother, brothers and sisters of the intestate, take equally: the children of deceased brothers and sisters standing *in loco parentis*.||

Representation among collaterals.

But this right of representation, being among collaterals, extends no farther than to the children of the brothers or sisters of the intestate:** thus a sister's son excludes a brother's grandson;†† and an uncle the son of a deceased aunt.‡‡

Mother.

If there be neither brother nor sister, nor the child of a brother or sister, the mother takes the whole.§§

Brothers and sisters, and descendants of brothers and sisters.

But a mother in law takes nothing.||| If there be no mother, the brothers and sisters take equally; and the children of a deceased brother or sister stand *in loco parentis*.

Kindred next after brother's and sister's representatives

If there be neither mother, brother, sister, nor children representing a brother or sister, distribution is made, without preference, among those who are then next in degree of kindred to the intestate, according to the civil law.***

* 2 *P. Wms.* 441-2.

† Sec. 5 of the stat. 2 *P. Wms.* 442.

‡ Sec. 6 of the stat. *Keylway v. Keylway*, 2 *P. Wms.* 346.

§ Sec. 6 of the stat.

|| 1 *Jac.* 2, c. 17, s. 7. *Keylway v. Keylway*, 2 *P. Wms.* 344.

** *Pett's case*, 1 *P. Wms.* 27.

†† *Pett's case*.

‡‡ *Bowers v. Littlewood*, 1 *P. Wms.* 594.

§§ 1 *Jac.* 2, c. 17, s. 7.

||| *Duke v. Duchess of Rutland*, 2 *P. Wms.* 216.

*** *Mentney v. Petty*, *Prec. Cha.* 593. 2 *Atk.* 117.

Paternal and maternal relations in equal degree take together.*

Paternal and maternal relations.

If there be neither mother, brother, sister, nor children, representing a brother or sister, the grandfather, or, if he is dead, the grandmother† takes, they being preferred before the children of a deceased brother or sister claiming in their own right, and not as representatives.

Grandfather, &c.

Next the grandfather, the great-grandfather (or if he is dead, the great-grandmother) uncles, aunts, nephews and nieces claiming in their own right, take together, as being in equal degree.

Great-grandfather, &c.

If there be none entitled in this degree, then the great-great-grandfather (or if he is dead the great-great-grandmother) great-uncle, first-cousin (or uncle's son) and great-nephew (or brother's grandson) take together, being equal in degree.

Great-great-grandfather, &c.

Distribution is not to be made until twelvemonths after the decease of the intestate.‡]

Distribution.

* *Moor v. Barham*, 1 P. Wms. 53.

† *Blackborough v. Davis*, 1 P. Wms. 41.

‡ Sec. 8 of the statute.

ON THE LAW OF EXECUTORS AND ADMINISTRATORS AS IT RESPECTS THE CHATTELS REAL OF A DECEASED TRUSTEE.

[In the following note the editor offers for the use of the student a few observations on the law of executors and administrators, as it affects chattels real, in gross or attendant, vested in a testator or intestate as a trustee. The note may serve as an appendage to the chapters on terms for years and leases, pages 29—60, and 312.

Where a chattel real vests in a sole or surviving trustee, it may, according to circumstances, either be bequeathed by him to trustees of his trust estates, or, if not so bequeathed, it may devolve upon his executor, or, if he does not appoint an executor, or dies intestate, upon his administrator. If he bequeaths it to two or more trustees, they will of course take as joint-tenants; and the chattel real will ultimately devolve upon the last survivor; from whom the representation must be deduced. *Co. Litt.* 182, a.

Interest and
power of exe-
cutor, &c.

Where there are several executors or administrators, the chattels real of their testator or intestate do not devolve upon them as joint-tenants; but, whether many or few, in the eye of the law, they take as one person, representing the testator or intestate, and having a several as well as a joint dominion over the whole of his effects. *Touch.* 484. *2 Prest. Abst.* 22. *Simpson v. Gutteridge*, 1 *Mad.* 609. Upon this principle it is, that one of several executors or administrators may assign the entirety of the lands comprised in the term vested in the deceased; and, if it was vested in the deceased beneficially, one of such executors or administrators may demise the whole or any part of the lands. The student will observe, that if the executors or administrators took as joint-tenants, an

assignment by one of them would work a severance. 2 *Prest. Abst.* 22.

It follows, therefore, that the survivor equally represents the deceased, and in the case of executors this representation devolves upon the executor of the last surviving executor who has proved* and so on, to the last surviving executor, of the last of the series of executors. When there ceases to be an executor representing the deceased trustee in whom a term was vested, then administration *de bonis non*, must be taken out to such deceased trustee, of his effects left unadministered by the last surviving executor of the series, with whom the representation ceased. When a sole administrator, or the last survivor of several co-administrators dies, fresh administration must be taken out to the deceased trustee of his goods, left unadministered by the deceased administrator; for it is a maxim, that neither the executor of an administrator, nor the administrator of an executor, is the legal personal representative of the original testator. 2 *Bl. Com.* 506. If there are no other effects of the original testator or intestate, except the term so vested in him as trustee, then letters of administration must be taken out, limited to the term. To illustrate some of the preceding observations, a term of 500 years is limited to *A.* and *B.* in the usual form, as joint-tenants; *B.* survives, and appoints *C.* his executor, who proves and dies, without appointing executors; or, having appointed executors, they die in his lifetime, or, surviving him, renounce or die without proving; the representation to *B.* ceases; and administration must be taken out of the effects of *B.*, left unadministered by *C.* Where there are several executors, the representation devolves upon the survivors and survivor, as above observed, and the law is the same where several joint-administrators are appointed.

Until probate, no one is complete executor, and the probate is the legal evidence of the executorship. 8 *Bar. & Cress.* 335: the executor, however, may assign a term vested in his

Administra-
tion *de bonis*
non.

Limited admi-
nistration.

Power of exe-
cutor before
probate.

* *Infra*, p. 466.

testator, as indeed he may do many other acts as executor, before the probate of the will. *Touch.* 499. *Wangford v. Wangford*, *Freem. K. B. Rep.* 520. And see *Watkins v. Brent*, 7 *Sim.* 512. *S. C.* 1 *Myl. & Cr.* 97. If there are several executors and all prove, the representation is carried on through the executor of the survivor, as before observed: if all the executors renounce, then administration, with the will annexed, must be granted to one or more administrators: but if only one or some of the executors renounce, those proving are the representatives for the time being: but if all who proved die, and any non-proving executor survives, he must either prove or renounce. 1 *Prest. Abst.* 186. If a sole executor dies before probate, he cannot transmit the succession to his executor. *Isted v. Stanley*, *Dyer*, 372, a. *Cro. Jac.* 614. 1 *Salk.* 308. So, if there are two executors, and one alone proves, and dies, leaving his co-executor surviving, who dies without renouncing or proving, but appointing executors, it would seem, also, that the representation ceases, and that the executors of the surviving, but not proving executor, do not represent the original testator. See *Bradley's MS. notes*, p. 130, in *Points in Conv.* ed. 1829. 1 *Prest. Abst.* 185. See also *4th Report of Real Property Commissioners*, 76-77, where a remedy is proposed for this inconvenience. The editor is not aware of any express decision on the point.

Disclaimer.

The executor of an executor may, before probate of the will of his own testator, disclaim to be the executor of the first testator, *Cro. Jac.* 614. *Freem. K. B. Rep.* 520. *Barker v. Railton*, 6 *Jurist*, 549. But he cannot so disclaim, after he has proved the will of his own testator; for he thereby becomes to all intents his complete executor, and consequently the executor of the first testator. *Ib.* & 1 *Prest. Ab.* 187. See also, *4th Report R. P. C.* 78, where a remedy is proposed.

Executor trustee.

When an executor is by the will appointed trustee of any portion of the testator's personal effects, he cannot, after probate, disclaim the trusts, 1 *Jacob*, 198. *Booth v. Booth*,

1 *Beav.* 125 : but where the executor is by the will made trustee of *real estate* devised to him alone, or to him and other persons in trust, it is considered doubtful, whether, even *after* probate, he may not disclaim the office of trustee of the real estate. The editor has in his possession several manuscript opinions of eminent counsel from which the better conclusion appears to be, that the probate, which has relation only to the personal estate, does not necessarily amount to an acceptance of the office of trustee of the real estate ; and in one of those opinions, *Mr. Preston* expresses himself as fully satisfied that the executor might first have disclaimed the trust of the real estate, and afterwards have accepted the executorship ; but that he considered the other point perfectly new, the inclination of his opinion being, that the disclaimer might also be made *after* probate. The editor is not aware of any decision on the point. The *dictum* in *Perkins*, *sect.* 548, in reference to a power of sale, seems to favour the power of disclaiming.

The student is also reminded that the probate of the will, as well as administration is void, if granted by an incompetent authority, as by a bishop of one diocese when the testator or intestate has *bona notabilia** in another. 1 *Salk.* 32. 1 *P. Wms.* 44. 767, or by an archbishop of effects not lying in his province. *Allison v. Dickenson*, 1 *Hardr.* 216. It is therefore a question of importance to ascertain whether the will was proved, and letters of administration granted by the proper Ecclesiastical Court ; a point frequently involved in uncertainty,†

Probate, &c.
by whom to be
granted.

If all the effects of the deceased lie within one diocese, the power of granting probate or administration rests with the

* Upon the question whether satisfied terms are *bonâ notabilia*, see some opinions collected in *Points in Conveyancing*, p. 132. *Ed.* 1829.

† See *Second Rep. R. P. Com.* p. 67—69. *Fourth Ib.* 51—54, 76—79.

bishop. 2 *Bl. Com.* 508. If *bona notabilia*, that is, goods of the value of 5*l.* lie in two or more dioceses, or in two or more peculiars within the same province, the probate or administration must be granted by the Prerogative Court of the Metropolitan of the province. *Ib.* If *bona notabilia* lie in different provinces, then the archbishop of each province must grant probate or administration of the goods in his province. *Hardr.* 216. 1 *Salk.* 39. *Wentw. Ex. Off.* 110, 14 *Ed.* So if there be *bona notabilia* in two dioceses of one province, and in one diocese of another province, the archbishop, in respect of the former, must grant probate, and, in respect of the latter, the peculiar bishop. 1 *Salk.* 39.

Chain of representation under different probates.

It appears to be doubtful whether the chain of representation is complete under probates granted by different Courts. Thus, if there are several executors, and they take out probate of the will of their testator in the Prerogative Court of *Canterbury*, and the surviving executor, having goods of his own only in one diocese, appoints executors and dies, and his executors prove his will in the Bishop's Court of that diocese, it is not settled, whether the executors of the surviving executor, are the representatives of the original testator; as probate was not taken out in the Prerogative Court of *Canterbury*. These facts occurred in the case of *Fowler v. Richards*, 5 *Russ.* 39, and *Sir John Leach*, M. R. held that the representation was complete. But in the late case of *Jernegan v. Baxter*, 5 *Sim.* 568, *Sir L. Shadwell*, V. C. observed, that before he acted upon that decision, he should direct a case for the opinion of a Court of law. See also *Twyford v. Trail*, 7 *Sim.* 92. Some Courts Baron have enjoyed the immemorial usage of granting probates of wills. For further details upon the subject of probates and grants of administration, the reader is referred to the ancient and modern treatises in which he will find the present subject fully discussed.]

OF STATUTES.

AS THEY RELATE TO CONVEYANCES.

CHARTER of *H. 1, A. D. 1101*.—Under the feudal law all lands were inalienable; but about the latter end of the reign of *William Rufus* this doctrine began to be relaxed, and lands were allowed to be aliened with the consent of the lord and the next heir. By the above Charter, the feudatory was expressly enabled to alien without the consent of any other person such lands as he had purchased himself; but this express provision did not take away the common law power of aliening lands derived by descent with the concurrence of the lord and heir. At this time the tenant had little more than the *usufruct* of the land, and therefore it was common to express in feoffments that the lands were holden of the chief lord of the fee, and that the feoffment was made with the consent of the feoffor's heir. A copy of this charter is given in *Blackstone's Tracts*, p. 286. *Charter Hen 1.*

Magna Charta, 17 John, A. D. 1215.—This famous statute made little alteration in the power of aliening feuds, except that it allowed one-fourth part of the lands taken by descent to be aliened without consent of the heir. It, however, established the widow's right to dower as it now stands (*Litt.* 36), and exempted lands from Crown debts, when the goods of the debtor were sufficient to answer the debt. *Magna Charta.*

Cha. Foresta.

Charta de Foresta, 9 *H.* 3, *A. D.* 1224.—Although by the feudal law lands were not allowed to be aliened, yet the King's tenants enjoyed the power of subinfeudation, which was nearly equivalent to a power of alienation. The proprietor of a feud granted a portion of the land to another person, to be held of himself, thus creating a tenancy, and yet not severing the land from the feud, for as between himself and the King the ancient services were due. This practice was soon followed by the sub-tenants, who aliened the greatest portion of their lands, and thereby rendered themselves incapable of yielding to the lord his services. The great lords, perceiving that they thus lost their feudal profits, procured a clause to be inserted in the *Charta de Foresta*, whereby it was provided, that "no freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him, which belongeth to the fee." See a comment on this clause, 2 *Inst.* 64.

Merton.

Statute of Merton, 20 *H.* 3, *A. D.* 1236.—This statute was passed in a convent of Augustine canons, situate at Merton, about seven miles from London, whence it derives its name. By this statute it is provided that tenants in dower shall be entitled to emblements; that lords of manors may enclose their wastes, provided they leave enough common for their tenants; and that infant heirs shall not be compellable to marry against their consent.

Marlbridge.

Stat. of Marlbridge (or Marlborough, in Wiltshire), 52 *H.* 3, *A. D.* 1267.—By the common law, lessees for years and life could commit waste with impunity. By this statute it is declared, that they shall "yield full damage for the waste committed, and be punished by amerciamment grievously." 2 *Inst.* 145.

Westm. 1st.

Stat. de Westminster primer, 3 *Edw.* 1, *A. D.* 1276.—By this statute the time of memory is limited to the reign of

King Richard the First, *July 6th*, 1189. This provision *Westm. 1st.* was seldom resorted to, except as a limit to the admission of evidence in tithe suits and claims of prescriptive right.

Stat. of Gloucester, 5 *Edw. 1, A. D.* 1278.—The remedy for waste given by the statute of *H. 3*, being found inadequate to the loss sustained, this statute enacted that the place wasted should be recovered, together with *treble damages*, as an equivalent for the injury done to the inheritance. *Harrow School v. Anderton*, 2 *Bos. & Pul.* 86. *Gibson v. Wells*, 1 *New Rep.* 290. *Gloucester.*

Stat. of Acton-Burnell, 11 *Edw. 1, A. D.* 1283.—By the *Acton-Burnell.* common law the lands of a debtor could not as against *himself* be taken in execution in an action of debt, but as against his *heir* they might. As commerce increased the inconvenience of this doctrine was felt, and about the 11th of *Edw. 1*, the stat. *de mercatoribus* was passed at Acton-Burnell, a castle belonging to the family of Burnell, in Shropshire, whereby it was enacted, that the chattels and *devisable burgages* of the debtor might be sold for the payment of his debts.—At this time lands were not generally devisable; but, by the local customs of certain borough towns, the lands and tenements within their respective precincts were allowed to be passed by will, and these by the above statute were made amenable to debts. *And see* 13 *Edw. 1, A. D.* 1285.

Stat. de Donis, 13 *Edw. 1, A. D.* 1286.—At the date of this *De Donis.* statute a gift to a man and the heirs of his body, provided that if he had no heirs the land to revert, was construed to give the donee a conditional fee, which enabled him, after issue begotten, to *alien* the land, and thereby to disinherit the issue, and to deprive the donor of his right of reverter. This interpretation is declared by the statute *de donis* to be “contrary to the minds of the givers, and the form expressed in the gift;” wherefore it is ordained, that the “will of the giver, according to the form in the deed of gift manifestly

De Donis.

expressed, be henceforth observed; so that they to whom the land is given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it is given after their death, or shall revert unto the giver or his heirs, if issue fail or there is no issue at all. And if a fine be levied hereafter upon lands so given, it shall be void in the law." A new writ is then provided for what the statute calls a "new case," which writ is called a *formedon*, from the object of it being to enforce the *form* of the gift.

*Westm. 2d.—
Elegit.*

Stat. of Westminster 2d, 13 *Edw. 1*, c. 18, *A. D.* 1286.—By this statute it is declared, "that when a debt is recovered, or acknowledged, or damages adjudged in the King's Courts, the plaintiff shall have his election either to have a writ of *fieri facias*, or else that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beast of the plough, and also *one-half of his lands*, until the debt be levied upon a reasonable price or extent." On this statute was framed the writ of *elegit*, so called because the creditor elects to take his remedy on the lands.

From the word *acknowledged* in this statute has sprung the powerful security by *warrant of attorney*, which is an authority from the debtor addressed to one or more attornies of some Court at Westminster, authorizing him or them to acknowledge a judgment, as for money lent or a debt due, which enables the creditor to sue out a writ of *elegit* as effectually, as if the judgment had been obtained in an adversary suit. In a modern case, Lord Kenyon said, he saw no difference between a judgment that was obtained in consequence of an action resisted, and a judgment signed under a warrant of attorney: since the latter was only to shorten the process, and lessen the expense of the proceedings. *Doe v. Carter*, 8 *T. R.* 57. *Et vide* *Sampson v. Goode*, 2 *Barn. & Ald.* 568. The sheriff, however, does not deliver actual possession on a writ of *elegit*, but only legal seisin, and the creditor is left to his action of ejectment

to obtain actual possession of the land ; on judgment in that ejectment a writ of possession issues, and a jury is impanelled to ascertain the moiety delivered by the sheriff. Hence it has been suggested, that a warrant of attorney to confess a judgment in ejectment is a proper accompaniment to a mortgage, as it shortens the process of recovering possession when the interest becomes in arrear, and at the same time assists in keeping the mortgagor punctual to his engagements—the only inconvenience attending a mortgage.

Elegit.[*Infra*, 1 § 2
Vict. c. 110.]

Stat. of Quia Emptores, 18 *Edw. 1, s. 1, c. 1, A. D. 1290.*—*Quia emptores.*
Prior to this statute any person might by a grant of land have created a tenure as of his person : but if no such tenure were reserved, the feoffee held of the feoffor by the same services by which the feoffor held of his superior lord. The consequence was, that all the fruits of tenure fell into the hands of the feoffors or mesne lords, to the prejudice of the superior lords of the fee ; for remedy whereof, it was by this statute enacted, “ That from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.”

It will be observed that this act relates only to conveyances in fee. If then a tenant in fee aliens to one for life, with remainder to another in tail, allowing the reversion to devolve upon himself, the tenant for life and tenant in tail still hold of the donor, who holds of the superior lord. Consequently, if an estate be given to a man and his heirs for the life of another person, and the grantee dies without heirs, the estate should escheat to the grantor and not to the superior lord. The doctrine of escheat, however, is scarcely applicable to a descendible freehold, and the Statute of Frauds provides, that if there be no special occupant, the *estate pour autre vie* shall go to the executors or administrators of the deceased tenant. Whether the words “ no special occupant ” embrace the case here supposed, is a point

Quia emptores. not now material to consider. Escheat arises in respect of the seignior; and this statute has reduced all subinfeudations to the original tenure of the chief lord of the fee. Since its date all lands must have changed owners, and on the first change of ownership the lands ceased to be holden of the feudist, and became again tributary to the lord. Manors no doubt were coeval with parishes, the one being a division peculiar to the clergy, and the other consisting of the domains of the great lay-lords. The boundaries of these domains could not at first have been so accurately defined as the boundaries of parishes, because they were in some measure dependent on the wealth or poverty of the owners. But manors appear to have been established, nearly as they now exist, at the time of the Norman Conquest; and although a tenure might have been created prior to this statute, it is apprehended that a manor could not have been then created by act of the party; for a manor, according to *Perkins, s. 670*, must consist of demesnes and services, and the latter can only arise by immemorial usage; see also 2 *Black. Com.* 89. 1 *Watk. Cop.* 5, 17, 4th ed. At this day all freehold lands within a manor are holden of the lord of that manor, to whom they return in case of the tenant's death without heirs. 12 *East*, 102, *et infra*, 54 *G.* 3.

An exposition of this statute is given in 2 *Inst.*; *et vide Bradshaw v. Lawson*, 4 *T. R.* 443. 2 *Ib.* 424. *Doe v. Huntingdon*, 4 *East*, 271. 2 *Maule & Selw.* 175. On the discovery of *America* the territory of *Virginia* was granted to a company of adventurers, "to be holden of the manor of *East Greenwich* in fee and common socage, paying in lieu of all services one-fifth of the gold and silver that should be found." See also the stat. 54 *G.* 3, *infra*, as to cases in which corruption of blood is now taken away.

1 *Richd.* 3rd. —
Uses.

Stat. 1 *Rich.* 3, c. 1, *A. D.* 1483.—At the date of this statute, if a feoffment were made to *A.* to the use of *B.*, *A.* took the legal estate and *B.* took a trust or confidence in equity, *A.* was called the feoffee to uses and *B.* the *cestui que*

use. The *cestui que use* however was the real beneficial owner, and the feoffee was merely a trustee. The *cestui que use*, being in possession, frequently aliened the lands, and afterwards the feoffee entered, which gave rise to several vexatious suits in Chancery: to remedy this inconvenience, the above statute gave the *cestui que use* in possession a power of alienating the legal estate by feoffment or other legal assurance, without the consent or concurrence of the feoffees. The Statute of Uses, 27 *H.* 8, has in effect repealed this act of *Richard* by conveying the estate of the feoffee to the *cestui que use* immediately on its creation, thereby effectually depriving the feoffee of all power of molestation. *Mr. J. Lawrence*, however, still treats the statute as existing, 7 *T. R.* 47. 8 *Ib.* 494; but *Sir Edward Sugden* has shewn that it has not now any operation whatever; *Gilb. U.* 67; *et vide* 1 *Sand. Uses*, 23, 4th ed. *Uses.*

Stat. of Fines, 4 *H.* 7, *cap.* 24, *A. D.* 1489.—By this statute, after reciting that fines were essential to avoid strifes and debates, it was enacted, that every fine levied in the Court of Common Pleas, of any lands, tenements, or other hereditaments, should be openly read and proclaimed in Court the same Term, and in three Terms next following, four days in every Term, and that such proclamations being so made, such fine should be final and conclude as well privies as strangers to the same, except women covert (other than parties to such fine), and every person within the age of twenty-one years, in prison or out of the realm, or not of whole mind at the time of such fine levied, not being parties to such fine. Saving to every person and their heirs, other than such parties, such right as they had to such lands, &c. at the time of such fine ingrossed, so that they pursued their title by action or entry *within five years* after the said proclamations made or their respective rights accrued. *Fines.*

In the next reign, by an act to explain the foregoing statute it was enacted, that all fines levied before the Justices of the Common Pleas, with proclamations according to the [32 *Hen.* 8,
c. 36.]

Fines.

statute 4 *H. 7, c. 24*, by persons of full age, of any lands, tenements, or hereditaments entailed to the person levying the same, or to any ancestor of the same person, in possession, remainder, reversion, or in use, should, after such fine levied, ingrossed, and proclaimed, be a bar against such persons and their heirs, claiming the said lands by force of such entail, and against all other persons claiming such lands to their use, or to the use of any heir of the bodies of them. This act was not to extend to entails in wives of the gift or procuration of their husbands, nor to entails of the gift of the Crown, whereof the reversion at the time of levying such fine should be in his Majesty.

By the stat. 31 *Eliz. c. 2*, fines were declared to be good, although they were proclaimed only once in each Term, instead of four times.

[But fines are now abolished by the stat. 3 & 4 *W. 4, c. 74.*]

Jointures.

Stat. of Jointure, 11 *H. 7, c. 20, A.D. 1495.*—If any woman having any estate in dower, or for term of life, or in tail jointly with her husband, or only to herself or to her use, in any manors, lands, tenements, or hereditaments *of the inheritance or purchase of her husband*, or given to the husband and wife in tail or for life by any of the *ancestors of the husband*, or by any other person seised to the use of *the husband or of his ancestors*, shall, being sole or with any after-taken husband, discontinue, alien, release, or confirm with warranty, or by covin, suffer any recovery of the same, all such recoveries, discontinuances, &c. shall be void; and the person next entitled to the inheritance after the woman's decease may enter as if no such discontinuance, &c. had been made. *s. 1.*

[*Watkins v. Lewis*, 1 *Russ. & Mylne*, 377.]

If any of such after-taken husbands and women, or any seised to their use, shall do, make, or suffer any such discontinuance, recoveries, &c., the heir in tail, or person entitled to the inheritance after the woman's decease, may enter on and enjoy such lands, &c. as against such husband during his

life, according to their respective interests as if such women *Jointures.* had been dead; provided such women, after the decease of their husbands, may re-enter and enjoy the same lands according to their first estate therein. *s. 2.*

If such woman at the time of such discontinuance, recoveries, &c. be sole, then she shall be barred of all interest in such lands, &c., and the person next entitled to an estate of inheritance therein after her decease may enter and enjoy the same according to his title. *s. 3.*

This act shall not extend to any recovery or discontinuance in which the heir next inheritable to such woman, or where the reversioner next after the death of such woman, is consenting to the same. *s. 5.*

Every such woman after the death of her first husband may give, sell, or make discontinuance of any such lands for term of her life only. *s. 6.* For an exposition of this stat., see *Gilb. U.* 339. *Cov. Rec.* 213.

[The above statute is now repealed, except as to lands comprised in settlements made before the passing of the act 3 & 4 *W. 4, c. 74, s. 17.* See also sect. 16.]

Stat. of Executors, 21 *H. 8, c. 4, A. D.* 1529.—This statute recites, that land devised to be sold by divers executors cannot by common law be sold by part of them; wherefore it is enacted, that where part of the executors, named in any will directing lands, tenements, or other hereditaments to be sold by them after the testator's death, refuse to administer, and the residue of the executors take on them the charge of the will, then all bargains and sales of such lands, &c. made by the latter only, shall be as effectual as if all the executors had joined in making the bargain and sale. *Executors.*

At the date of this act, lands were only devisable in particular places; but feoffments to such uses as the feoffors should appoint enabled the owners of land to declare the uses by a testamentary writing, and these declarations of use were the wills alluded to by the statute, and therefore it may be supposed that this act was rendered nugatory by the Statute

Executors.

of Wills. By construction, however, this statute has been held to apply to devises at this day, and to embrace, not only a power but an absolute devise of the legal estate to the executors to sell. *Bonifaut v. Greenfield*, Cro. Eliz. 80. See *Bro. Devise*, pl. 3; and *Hawkins v. Kemp*, 3 East, 410. The devise must be to the persons as *executors*; or at least the fund when raised must be distributable by them in that character. A mere devise to persons to sell, and afterwards an appointment of them as executors, will not, it is said, bring the case within the act. *Sug. Gilb. U.* 138. See further on this stat. 1 *Sug. Pow.* 140. 1 *Pow. Mortg.* 248, a, and the case of *Tylden v. Hyde*, *ante*, p. 268.

Uses.

Stat. of Uses, 27 H. 8, c. 10, A. D. 1535.—This famous statute is treated of *ante*, p. 240. Besides its peculiar

Jointures.

operation in reference to uses, it enacts, that where a woman has a jointure, she shall not be entitled to her dower also; but if she be evicted of her jointure, her dower shall revive; and that if the jointure be made after marriage, she shall have her election, when the coverture has ceased, to have either her dower or her jointure, but not both.

Enrolment.

Stat. of Enrolments, 27 H. 8, c. 16, A. D. 1536.—This statute is also treated of *ante*, pp. 356, 357, and 361.

Partition.

Stat. of Partition, 31 H. 8, c. 1, A. D. 1539.—By this statute it was enacted, that all joint-tenants and tenants in common of any estate of inheritance in their own right, or in the right of their wives, should be compelled to make partition between them, in like manner as coparceners by the common law were compellable to do. This statute relates to estates of inheritance only. By a stat. of the next year, joint-tenants and tenants in common for *lives or years* are declared compellable to make partition in the same way.

Wills.

Stat. of Wills, 32 H. 8, c. 1, A. D. 1540.—By this statute it is enacted, that all persons having any manors, lands,

tenements, or hereditaments, holden in socage or of the nature of socage tenure, shall thereafter have full and free liberty, power, and authority to give, dispose, will, and devise the same, as well by his last will and testament in writing, as by any act or acts lawfully executed in his life, at his free will and pleasure. In confirmation of this stat. it was enacted by the 34 & 35 *H.* 8, *c.* 5, that all and singular person and persons, having a *sole* estate or interest in fee-simple, or seised in fee-simple, in coparcenary or in common, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise the same to any person or persons (*except bodies politic and corporate*), by his last will and testament in writing, at his and their own free will and pleasure.

The Enabling Stat. of 32 *H.* 8, *c.* 28, *A. D.* 1540.—*Enabling Stat.*
By the common law, all persons may make leases to endure —*Leases.*
so long as their interest in the land continues, but no longer. The stat. enabled a tenant in tail to make a lease for three lives, or twenty-one years, to bind his issue: Secondly, a husband seised in right of his wife in fee-simple or fee-tail, to make a similar lease to bind his wife and her heirs, provided she joins therein: Thirdly, ecclesiastical persons seised of an estate of fee-simple in right of their churches (not parsons or vicars, who are seised for life only), to make leases to bind their successors. But certain requisites must be observed in making those leases; for which see 2 *Black. Com.* 319. As to the clause saving the wife's entry in this statute, *vide supra*, p. 395—6, and for other enabling statutes, see 55 *G.* 3, *c.* 147. 56 *G.* 3, *c.* 52. 56 *G.* 3, *c.* 141. 39 & 40 *G.* 3, *c.* 41; by which latter act ecclesiastical lands may be let in parts, so that the aggregate rents amount to the old reservation; and see on this subject, 8 *Co.* 69. *Cro. Car.* 22. 4 *Cru. Dig.* 70, 4th ed. 3 *Pow. Mortg.* 383.

*Reversions.
Conditions.*

Stat. of Reversions, 32 *H.* 8, *c.* 34, *A. D.* 1540.--By the common law, if a man let land to another for life, by indenture, rendering rent with a condition of re-entry in default of payment, if afterwards the lessor granted the reversion to a stranger, and the tenant for life attorned, such grantee could not take advantage of the condition as the lessor or his heirs might have done if the reversion had continued in him. But now by the above statute grantees of reversions, and privies in estate, are enabled to take advantage of the breach of conditions and covenants against the lessees the same as the lessors or grantors might have done; and by sect. 2, lessees may have the like remedies against the grantees of the reversions which they might have had against their grantors. For an exposition of this statute, see *Co. Litt.* 215, a.

Recoveries.

Stat. of Recoveries, 34 & 35 *H.* 8, *c.* 20, *A. D.* 1543.—This statute is noticed, *ante*, p. 212. As to the operation of fines on estates tail of the gift of the Crown, see Statute for the Exposition of Fines, *ante*, p. 473.

Disabling stat.

Disabling statutes,—1 *Eliz.* *c.* 20. 13 *Eliz.* *c.* 10. 14 *Eliz.* *c.* 11. 18 *Eliz.* *c.* 11. 43 *Eliz.* *c.* 9. 17 *G.* 3, *c.* 53. 21 *G.* 3, *c.* 66. 39, 40 *G.* 3, *c.* 41. 43 *G.* 3, *c.* 84. 55 *G.* 3, *c.* 147. 56 *G.* 3, *c.* 141. 57 *G.* 3, *c.* 99.—These statutes regulate the power of alienation between ecclesiastical persons in possession and their successors. They are too voluminous for insertion here. The subject of them is in part discussed in *Cov. Mortg. Prec.* 285, particularly with reference to the power of a rector to charge his living: [and see *Shaw v. Pritchard*, 10 *Barn. & Cress.* 241. *Aberdeen v. Newland*, 4 *Sim.* 281. *Flight v. Salter*, 1 *Bar. & Adol.* 673. *Gibbons v. Hooper*, 2 *Ib.* 734. *Doe v. Ramsden*, 4 *Ib.* 608. *Newland v. Watkin*, 9 *Bing.* 113. *Faircloth v. Gurney*, *Ib.* 622.]

*Fraudulent
Conveyance.*

Stat. of Fraudulent Conveyances, 13 *Eliz.* *c.* 5, *A. D.* 1570, made perpetual by 29 *Eliz.* *c.* 5.—This statute enacts that every conveyance of lands, hereditaments, goods, and

chattels, or of any lease, rent, common or other profit or charge, out of lands, &c., by writing or otherwise, and every bond, suit, judgment, and execution, to be had or made *with the intent to defraud creditors* or others of their actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, shall be deemed (only as against that person, his heirs, executors, administrators and assigns, whose actions, &c. are or shall be any way disturbed, delayed, or defrauded,) to be utterly void. And by the 27 *Eliz. c. 4, s. 2*, made perpetual by the statute 39 *Eliz. c. 18*, it is enacted that every conveyance of lands, tenements, or other hereditaments whatsoever, had or made *with the intent and purpose to defraud* and deceive any person or persons, bodies politic or corporate, who shall purchase the same, shall be deemed and taken (only as against that person or persons, body politic or corporate, his and their heirs, successors, executors, administrators, and assigns,) to be utterly void, frustrate, and of none effect.

*Fraudulent
Conveyances.*

The deeds which are rendered void by these statutes are of two sorts :—1. Deeds made with an express intent to defraud creditors or subsequent purchasers. 2. Deeds made upon good but not valuable considerations ; which are usually called voluntary conveyances. These statutes have been very prolific in litigation, and the cases upon them are both numerous and complicated. They are collected and treated of with great ability by Mr. Roberts, in his *Essay on Fraudulent Conveyances* ; and by Mr. Atherley, in his *Treatise on Settlements*. [It would appear to be the better opinion, that to render a conveyance fraudulent within the statute 13 *Eliz. c. 5*, the party at the time of making it must be indebted to the extent of insolvency ; and that a person may render himself insolvent by conveying his property to a person who is not a creditor. *Shears v. Rogers*, 3 *Bar. & Adol.* 362.]

Stat. of Recoveries, 14 *Eliz. c. 8, A. D.* 1572.—After reciting that tenants in tail after possibility of issue extinct, and other tenants for life or lives, had suffered common reco-

*Recoveries by
tenant for life.*

*Recoveries by
tenant for life.*

veries, to the prejudice of those in remainder or reversion, it is enacted, that all such recoveries had or prosecuted by covin, against any such particular tenant, or against any other with voucher over of such particular tenant, shall as against all persons in remainder or reversion be utterly void, provided that that act shall not extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent appear of record in any of her Majesty's Courts.

Tenants for life were thus enabled to join in recoveries without forfeiting their estates; *et vide* 3 *Taunt.* 373, *arguendo*. As to errors in fines and recoveries, see 23 *Eliz. c. 3.* 27 *Eliz. c. 9.* 31 *Eliz. c. 2.* 32 *Geo. 2, c. 16.* [See also 3 & 4 *W. 4, c. 74, § 8—12.*]

Limitations.

Stat. of Limitations, 21 *Jac. 1, c. 16, A. D. 1623.*—For quieting of men's estates and avoiding suits, be it enacted, that no person shall hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title shall first descend or accrue to the same; except infants, *femes covert*, persons *non compos mentis*, imprisoned or beyond the seas, who shall have ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, to make their entry or claim in.

In applying this statute to a case in practice, the principal object was to ascertain the precise period when the possession became adverse, for from that time only the twenty years began to run; and it is to be remembered that each successive owner in remainder had twenty years to assert his title from the time the remainder fell into possession: but when the twenty years had once commenced, they continued to run on, although disabilities intervened. The Court of Chancery, in analogy to the Statute of Limitations, adopted the period of twenty years within which all equitable rights and interests are held barred, as stated *ante*, p. 231. [The old remedies

by real action have been abolished by the Statute of Limitations. *Limitations.* 3 & 4 W. 4, c. 27, s. 34.]

Stat. abolishing Tenures, 12 Car. 2, c. 24, A. D. 1660.—By this statute it is enacted, that all tenures by knight's service, held of the King or others, and the fruits and consequents thereof, be henceforth taken away and discharged, and that all tenures of every sort be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty; and that all tenures which shall be created by the King, his heirs, or successors, in future shall be held in free and common socage. But it is declared that the act shall not take away any rent heriot or suit of Court incident to any tenure altered by that act, or other services incident or belonging to tenure in common socage, or the fealty or distresses incident thereto, sect. 5. *Abolition of tenures.*

It is also enacted, sect. 8, that the father, although under twenty-one, may by deed or will, attested by two witnesses, appoint who shall be guardians of his children after his decease, until they attain twenty-one, or for any less period, in exclusion of the mother by nature and of the next of blood by socage. [But now no will of a minor is valid, 1 Vict. c. 26, s. 7.] *Guardians.*

The testamentary guardian has the custody not only of the lands and goods descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in socage had not. *Vaugh.* 185, 186. 2 *Fonbl. Treat. Equity*, 225. 5th ed.; *et vide* 2 *Byth. Prec.* 399.

Stat. of Life Estates, 19 Car. 2, c. 6, s. 2, A. D. 1661.—It is enacted by this stat., that if any person for whose life an estate is granted shall go abroad, and in any action commenced for the recovery of the lands by the lessors or reversioners, there shall be no sufficient proof that such person is alive, the judge shall direct the jury to give their verdict as if the person so remaining abroad were dead; and by the stat. 6 *Life Estates.*

Life Estates. *Ann. c. 18*, it is provided that the remainderman and reversioner may once a year apply to the Lord Chancellor, on affidavit, for an order to have any person, on whose life his remainder or reversion is expectant, produced to such persons (not exceeding two) as shall in such order be named by the party petitioning; and on non-production of such person, the remainderman or reversioner, shall be at liberty to enter upon the estate as if such tenant for life were dead. But if the tenant for life afterwards appear, he may re-enter.

Distributions. Stat. of Distributions, 22 & 23 *Car. 2, c. 10, A.D. 1670*.—This statute is explained by *Lovell, Toller, and Mascall*. [The reader is referred to the chapter upon this statute, *supra*, p. 460.]

Frauds. Stat. of Frauds and Perjuries, 29 *Car. 2, c. 3, A.D. 1677*,—for prevention of many fraudulent practices and perjury, be it enacted,

All agreements respecting land to be in writing. That from henceforth all leases, estates, interests of freeholds or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding. *s. 1.*

Except leases not exceeding three years. Except nevertheless all leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the value of the thing demised. *s. 2.*

Assignments and surrenders to be in writing. And moreover, That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any

messuages, manors, lands, tenements or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents, thereunto lawfully authorized by writing or by act and operation of law. *s. 3.* [7 & 8 Vict. c. 76, s. 4.]

And be it further enacted, That from henceforth no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage: or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them: or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. *s. 4.* *All contracts to be in writing.*

And be it further enacted, That from henceforth all devises and bequests of any lands or tenements devisable either by force of the Statute of Wills or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void, and of none effect. *s. 5.* *All devises to be in writing, and signed in the presence of three witnesses.*

And, moreover, No devise shall be revocable otherwise than by some other will or codicil, or by burning, tearing, cancelling, or obliterating the same by the testator himself, or in his presence and by his directions and consent. *s. 6.* *Revocation of devises.*

[The two preceding sections, 5 and 6, are now repealed by the recent statute 1 Vict. c. 26, s. 2, so far as respects wills made on or after the first day of *January*, 1838.]

*All declarations
of trust to be in
writing.*

And be it further enacted, That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing or else they shall be utterly void and of none effect. s. 7.

*Trusts by im-
plication.*

By sect. 8, trusts arising by implication of law are excepted, but all assignments of trusts must be in writing.

*Debts of cestui
que trust.*

By sect. 10, it is declared that lands, tenements, rectories, tithes, rents, and hereditaments, in the hands of trustees, may be taken in execution for debts recovered against the *cestui que trust*, but that such lands shall be held free from the incumbrances of the trustee; and trusts are declared *assets* in the hands of the heirs of the *cestui que trust*.

But no heir by reason thereof is to become chargeable in respect of his *own* estate. s. 11.

*Estates pur
auter vie.*

And be it further enacted, That from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. s. 12.

*Personal
engagements
above 10l. to be
in writing.*

And be it further enacted, That from henceforth no contract for the sale of any goods, wares, or merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized, s. 13.

The statute then relates to nuncupative wills.

[The sections 12, 19, 20, 21, and 22, of the Statute of Frauds are repealed by the statute 1 *Vict. c. 26, s. 2.*]

Stat. of Fraudulent Devises, 3 *W. & M. c. 14, A. D. 1691*, *Fraudulent devises.* is repealed by the 1 *W. 4, c. 47*, and amended provisions substituted in lieu thereof, *infra*.

Stat. of Clandestine Mortgages, 4 & 5 *W. & M. c. 16, A. D. 1692*.—If any person having once mortgaged his lands for a valuable consideration shall again mortgage the same lands, or any part thereof, to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee the first mortgage, such mortgagor so again mortgaging his lands, shall have no relief or equity of redemption against the second mortgagee. But this act is not to bar any widow of dower who does not legally join her husband in such second mortgage. *Clandestine Mortgages.*

Stat. of Mortmain, 7 & 8 *W. 3, c. 37, A. D. 1696*.—By *Mortmain.* the statute *de religiosis*, 7 *Edw. 1*, it is declared that no person shall “presume to buy or sell, or by any device to appropriate lands, (under pain of forfeiture of the same) whereby such lands may come into mortmain.” The effect of this statute was to prohibit all alienations to corporate bodies. By the above statute of *W. 3*, it was made lawful for the King, his heirs and successors, to grant to any person or persons, bodies politic or corporate, their heirs and successors, *licenses* to alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever. By a subsequent statute (9 *G. 2, infra*), alienations to *charitable uses* are allowed under certain regulations.

Posthumous Children, 10 & 11 *W. 3, c. 16, A. D. 1699*.— *Posthumous Children.* By this act posthumous children born after the decease of the father, are declared entitled to take estates as if they were born in his lifetime, although there be no limitation to trustees to support the contingent uses to such children.

Registry Acts. Registry Acts, 2 & 3 *Anne*, c. 4, *A. D.* 1703. 5 & 6 *Anne*, c. 18, 1706. 6 *Anne*, c. 35, 1707. 7 *Anne*, c. 20, 1708. 8 *G.* 2, c. 6, 1735.—By these statutes it is provided, that all deeds, wills, and documents of every description, concerning or affecting any hereditaments in Middlesex, York, or Kingston-upon-Hull, shall be registered in offices established for that purpose in the counties and town above mentioned. In these statutes copyhold estates, leases at rack-rent, and leases for twenty-one years, where the actual possession accompanies the lease, as also chambers in Serjeants' Inn, the Inns of Court and Chancery, are excepted; and it is declared that no judgment, statute, or recognizance shall take effect but from the time of registry. For an exposition of these statutes, see *Rigge on Registration*, 1 *Sug. V. & P.* 549. 2 *Ib.* 211. 2 *Pow. Mort.* 622, a, 627, a. 2 *Watk. Cop.* 155, 4th ed.

Advowsons. Stat. of Advowsons, 7 *Anne*, c. 18, *A. D.* 1708.—By this act it is declared, that no usurpation shall displace the estate of the patron; and that if coparceners, joint-tenants, and tenants in common, are seised of an advowson, and a partition is made to present by turns, each shall be seised of a separate estate to present accordingly.

By stat. 12 *Anne*, c. 12, s. 2, *A. D.* 1713, clergymen are prohibited from purchasing the next avoidance or presentation of any ecclesiastical benefice, so as to be presented and collated thereupon *themselves*. The words of the act are very extensive, but they are generally taken with a less signification than they import. For an exposition of this statute and the subject in general, see *Mireh. on Advowsons*.

Infants. The statute of 7 *Anne*, c. 19, *A. D.* 1708, relative to infants, has been repealed, and amended provisions in lieu thereof are substituted by the 1 *W.* 4, c. 60, *infra*.

Copyholds. Stat. of Copyholds, 9 *G.* 1, c. 29, *A. D.* 1722, which statute enables *femes covert* and infants to be admitted to

copyhold lands by their attorneys or guardians, is now *Copyholds*. repealed, and provisions in substitution thereof enacted in 1 *W.* 4, c. 65, s. 3—11, *infra*.

Statutes 4 *G.* 2, c. 10, *A. D.* 1734, 6 *G.* 4, c. 74, 9 *G.* 4, *Lunatics*. c. 78, and 11 *G.* 4, c. 65, are repealed by 1 *W.* 4, c. 60, 65, *infra*.

Stats. concerning Landlord and Tenant, 4 *G.* 2, c. 28, *Tenant holding over*. *A. D.* 1734.—Where any tenant holds over after demand made, and notice in writing given by the landlord for delivering the possession (notice to quit in writing before the expiration of the lease, being a sufficient notice within this stat., 2 *Black. Rep.* 1076), such persons so holding over shall pay *double the yearly value* of the lands so detained, for so long time as the same are detained, to be recovered by action of debt; against the recovering of which penalty there shall be no relief in equity.

This act also declares that on half a year's rent becoming in arrear, the landlord may commence his ejectment without any formal demand or re-entry; but he is not to recover against a mortgagee of the lease, if, within six months, such mortgagee pays the rent, and afterwards duly performs the covenants. And if before judgment in ejectment be pronounced, the tenant tender the rent and costs, the proceedings are to cease. The statute further enacts, that chief leases may be renewed without surrendering all the under leases.

By the stat. 11 *G.* 2, c. 19, s. 18, *A. D.* 1738, it is declared, that in case any tenant shall give notice of his intention to quit, and shall not accordingly deliver up possession of the premises at the time in such notice mentioned, then such tenant, his executors or administrators, shall from thenceforward pay to the landlord *double the rent* which he should otherwise have paid. *Renewals*.

This statute also empowers landlords to follow goods fraudulently and clandestinely removed for thirty days, and to seize stock or cattle on the premises, and to cut all sorts of corn,

Renewals.

grass, hops, or other product for arrears of rent. It also regulates the law upon distress and replevins, and enacts penalties on tenants secreting ejectments served on them. It further provides for cases where tenants desert the premises, leaving the possession vacant. See also the 57 G. 3, c. 93, for regulating the costs of distresses for small rents, and the act, 1 G. 4, c. 87, for facilitating the remedy by ejectment, *infra*.

Foreclosures.

Stat. of Foreclosures, 7 G. 2, c. 20, A. D. 1734.—By this act it is provided, that after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee shall maintain no action of ejectment or foreclosure, but may be compelled to re-assign his securities, and to deliver all the mortgage deeds and writings to the mortgagor. For an exposition of this stat. see 1 *Pow. Mortg.* 168, a. 2 *Ib.* 992, 998.

[Power to
assignee of
judgment.]

[9 G. 2, c. 5, an important statute relating only to *Ireland*, gives to the *assignee* of a judgment the same powers as the original *conusee*, a proper memorial according to the requirements of the act being made by the *conusee*: the same powers are by the 25 G. 2, c. 14, (1) extended to all subsequent assignees.]

*Charitable
Uses.*

Stat. of Charitable Uses, 9 G. 2, c. 36, A. D. 1736.—This is an enabling statute rather than a disabling one. It enacts, that no hereditaments, nor any sum to be laid out in hereditaments, shall be in any ways conveyed or settled to any person or body corporate *in trust, or for the benefit of any charitable uses whatsoever*, unless such gift, conveyance or settlement be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; sect. 1. By sect. 2 it is declared, that nothing thereinbefore mentioned relating to the sealing and delivering of any deed

twelve calendar months before the death of the grantor shall extend to any purchase for a full and valuable consideration actually paid before the making such conveyance without fraud or collusion. Sect. 3 declares, that all other gifts to charitable uses shall be void. For the numerous classes of cases within the operation of this act, see 2 *Roper's Legacies*, ch. 19, p. 117, *et seq.* ed. 1828.

*Charitable
Uses.*

By the 52 *G. 3, c. 102* (9th *July*, 1812), a memorial of all charities is required to be registered with the clerk of the peace in each county, within six calendar months after the passing of the act; and it is declared, that all charitable donations thereafter to be made shall be registered in like manner with the clerk of the peace within twelve months after the making the same.

By 1 & 2 *G. 4, c. 92*, 1821, trustees of charities are enabled to exchange lands, *supra*, p. 450.

Pigott's Act, 14 *G. 2, c. 20, A. D. 1741*.—This stat. provides, 1st, That the deeds making the tenant to the *præcipe* may be executed at any time during the Term in which the recovery is suffered. 2d, That it is not necessary for freehold leases for lives at reserved rents to be surrendered, nor for the lessees to join in making a tenant to the writ of entry. 3d, That a purchaser after twenty years may produce the recovery deed in evidence of the recovery having been suffered, although no entry of it appears on record. 4th, That all common recoveries not disputed within twenty years shall be deemed valid, notwithstanding the deed for making the tenant to the *præcipe* be lost or shall not appear. And, 5th, that estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the Statute of Frauds, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate. *Supra*, p. 73, 74.

*Recoveries—
Pigott's Act.*

Occupancy.

By stat. 21 *II. 8, c. 15*, lessees for years are secured from the operation of recoveries suffered by their landlords.

And by 14 *Eliz. c. 8*, lessees for life are empowered to join in recoveries without incurring a forfeiture of their estates, *ante*, p. 481—2.

[The statute 3 & 4 *W. 4, c. 74*, abolishes fines and recoveries in *England*, and by *ss. 7, 8, 9, 10, and 11*, renders valid fines and recoveries in certain cases without amendment. See 4 & 5 *Edw. 6, c. 92*, the corresponding statute for *Ireland*, *ss. 4, 5, 6, 7, and 8.*]

Wills —Attestation.

Wills, 25 *G. 2, c. 6, A. D. 1752*.—By this statute (*s. 1*), it is enacted, that if any beneficial devise or legacy be given to a person attesting the will devising, or bequeathing such benefit (except the same be for payment of a debt due to such person,) such devise or bequest shall, so far only as concerns the person so attesting, be utterly void; and such person shall be admitted as a witness to such execution, within the intent of 29 *Car. 2, c. 3, s. 5*.

By sects. 3 and 6 it is declared, that a devisee or legatee who has been paid, or accepted, or released, or has refused his devise or legacy, shall be admitted as a competent witness. By sect. 4 it is declared, that after a legatee has renounced his legacy, he shall never after be entitled to it; and if he has accepted his legacy, he shall [be entitled to retain it, notwithstanding the will or codicil be afterwards adjudged void for want of due execution, or for any other cause.] It is further declared, that a legatee attesting a will and dying in the lifetime of the testator, or before he has received or refused his legacy, shall be admitted as a legal witness [by proof of his handwriting.] The credit of a witness is to be determined by the Court.

[The above act does not apply to wills merely disposing of personal estate. 3 *Add. (Arches.) 210, 213, n. 1 Hagg. (Prerog.) 58. 3 Russ. C. R. 436. 3 Sim. 40.*]

By a late case it has been decided, that an executor is a competent witness to the testator's sanity, although he takes a beneficial interest under his will. *Doe d. Wood v. Teage, 5 Barn. & Cress. 335.* [See the recent statute 1 *Vict. c. 26, ss. 14—17, supra*, pp. 374—6, *text.*]

Renewal of Leases by incapacitated Persons. 29 *G. 2, c. 31*, *Renewal of Leases.* *A. D. 1756*, and 11 *G. 3, c. 20*, *A. D. 1771*, are repealed, and amended enactments substituted, by 1 *W. 4, c. 65, ss. 12 to 16, infra*.

Nullum Tempus Act, 9 *G. 3, c. 16*, *A. D. 1769*.—By this *Nullum Tempus.* statute the Crown is disabled from suing for the recovery of any lands, tenements, or hereditaments, where its right hath not accrued within a period of sixty years next before; *et vide* 11 *East*, 488, for a case on its construction.

Roman Catholics, 18 *G. 3, c. 60*, *A. D. 1778*.—By this *Papists.* act Roman Catholics taking the oaths of allegiance to his Majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrine of destroying heretics, and deposing princes excommunicated, are enabled to take and hold lands; *et vide* 31 *G. 3, c. 32*. [7 *G. 4, c. 7*.]

[The statute 7 *G. 4, c. 45*, *A. D. 1826*, which repealed the *Money-land.* 39 & 40 *G. 3, c. 56*, (*A. D. 1800*) (commonly called *Lord Eldon's act*, for barring *quasi* entails of money directed to be laid out in lands to be settled) was repealed by the statute 3 & 4 *W. 4, c. 74*, except so far as related to proceedings commenced under it, before the 1st day of *January, 1834*. The statute 3 & 4 *W. 4, c. 74*, abolishing fines and recoveries, empowers tenants in tail by deed, in conformity with its provisions, to bar their estates tail: and confers upon them at the same time more extensive powers of alienation than they possessed through the medium of fine or recovery. The 71st section enacts that lands to be sold of any tenure where the money arising from sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall, for the

Money-land.

purposes of the act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would have been actually subject to: and all the previous clauses of the act, so far as circumstances will admit, shall in the case of lands to be sold (except copyhold) apply to such lands, in the same manner as if the lands to be purchased with the money to arise from the sale thereof, were directed to be freehold, and were actually purchased and settled; and shall in the case of lands to be sold as aforesaid, being copyhold, apply to such lands, as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of land to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled: except that where the disposition shall be of leasehold or of money so circumstanced as aforesaid, such leasehold or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate; and except as to bankruptcy the deed of disposition thereof shall be an assignment by deed to be enrolled in Chancery within six calendar months after its execution; and in every case of bankruptcy the disposition of such leasehold or money shall be made by the commissioners and completed by enrolment as before directed in regard to lands, not held by copy of Court roll. Section 63 is the corresponding section in 4 & 5 W. 4, c. 92, for *Ireland*.] On the construction of *Lord Eldon's* act see 5 *Madd.* 407. 5 *Ves.* 12. 6 *Ib.* 576. 8 *Ib.* 609. 9 *Ib.* 462, 56. The Irish Act for a similar purpose is 58 G. 3, c. 46, *A. D.* 1818.

Crown Lands.

Crown Lands, 39 & 40 G. 3, c. 88. See 1 G. 4, c. 1, *infra*, p. 501.

The lands which in this act are recited to devolve on the Crown for want of heirs, are only such as are held immediately

of the Crown, as is apparent from the construction given to the two prior acts respecting escheats (8 *H.* 6, *c.* 16. 18 *H.* 6, *c.* 6): in the case of *Doe v. Redfern*, 12 *East*, 96, 102: *et vide supra*, stat. *Quia Emptores*, and 54 *G.* 3, *c.* 145; as to corruption of blood, *infra*, p. 496. *Crown Lands.*

Thelluson's Act, 39 & 40 *G.* 3, *c.* 98, *A. D.* 1800.—This statute has been already noticed and commented on, *ante*, pp. 208—9. *Accumulative Trusts.*

Inclosure Act, 41 *G.* 3, *c.* 109, *A. D.* 1801.—This is an act for consolidating the provisions usually inserted in local inclosure acts, and for facilitating the mode of proving the several facts usually required on the passing such acts. The provisions are too numerous for insertion here. It was amended by 1 & 2 *G.* 4, *c.* 23, which gave landlords a power of distress before the execution of the award, and enabled incumbents to grant leases in certain cases. *Inclosure Act.*

Land Tax Consolidation Act, 42 *G.* 3, *c.* 116, *A. D.* 1802. *Land Tax.*
—By sect. 52, tenants in tail are enabled to convey such parts of their estates as shall be deemed eligible and necessary to be sold for the redemption of the land tax charged thereon, by deed indented and enrolled, or registered in the manner prescribed by this act; and it is declared; that every such deed shall be as effectual as if the tenant in tail had levied a fine or suffered a recovery thereof. The late acts on this subject are 1 & 2 *G.* 4, *c.* 123. 3 *G.* 4, *c.* 14. 4 *G.* 4, *c.* 68. 7 & 8 *G.* 4, *c.* 75. 9 *G.* 4, *c.* 38.

Stat. concerning Lunatics, 43 *G.* 3, *c.* 75, *A. D.* 1803.— *Lunatics.*
Repealed and amended enactments substituted in 1 *W.* 4, *c.* 65, *infra*.

Property Tax Consolidation Act, 46 *G.* 3, *c.* 65, *A. D.* 1806, expired 1816.—The following is a list of the acts on this subject, which are now no farther serviceable than as *Property Tax.*

Property Tax. shewing the allowances to be made in old accounts. 38 G. 3, c. 16.—10*l. per cent.* on incomes above 200*l.* a year, 1798. 39 G. 3, c. 13. 39 G. 3, c. 22. 39 G. 3, c. 42. 39 G. 3, c. 72. 39 & 40 G. 3, c. 96. 43 G. 3, c. 122.—reduced to 5*l. per cent.* 45 G. 3, c. 110.—raised to 6½*l. per cent.* 46 G. 3, c. 65.—raised to 10*l. per cent.* 1816, 56 G. 3, c. 65.—continuing former acts till arrears paid. On the motion of Mr. [now Lord] Brougham in 1816, all the official accounts and returns, and every paper connected with this tax, were ordered by the House of Commons to be burnt; which was accordingly done.

Annuity Act. Annuity Act, 53 G. 3, c. 141, A.D. 1813, *July*,—amended 3 G. 4, c. 92.—By these acts every grant of annuity is required to be enrolled in Chancery within thirty days after its execution, otherwise it is declared null and void. See 1 *Byth. Prec.* 330, for an exposition of these statutes, and the late cases of *Cupit v. Jackson*, 1 *McCl. & Yo.* 495. *Calton v. Porter*, 2 *Bing.* 370. *Fairfield v. Weston*, 2 *Sim. & Stu.* 95. *Hicks v. Keats*, 2 *Barn. & Cress.* 1. 4 *Ib.* 69. *Storton v. Tomlins*, 2 *Bing.* 475. [4 *Ib.* 214. 5 *Barn. & Cress.* 258. 8 *Dow. & Ry.* 773. 6 *Barn. & Cress.* 165, 366, 689. 1 *Sim.* 153, 689. 3 *Yo. & J.* 136. 3 *Russ.* 267. 9 *Barn. & Cress.* 396. 2 *Bar. & Adol.* 315.]

Corruption of blood. Corruption of Blood, 54 G. 3, c. 145, A. D. 1814.—By this statute corruption of blood is taken away for attainder of felony, except in cases of treason, petit treason, and murder. The statute enacts that no attainder of felony, except in the lastly-mentioned cases, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only.

Between *forfeiture* and *escheat* there is this difference. Forfeiture is a punishment for a malignant offence. Escheat arises from an obstruction in the course of descent. The former is personal to the offender; the latter respects his

successor. Forfeiture affects the rents and profits only; *Corruption of blood.* escheat operates on the inheritance. Thus, in the case of forfeiture for felony, if the felon be seised of an estate in fee-simple, the lands will stand forfeited to the King for a year, day, and waste, and afterwards to the lord of the manor for the residue of the felon's life, provided the lord, as is usually the case, can shew a prescriptive right to or a grant from the Crown of felon's goods. If the lord cannot prove his right to the goods and chattels of the felon, then the rents and profits of the felon's estates will belong to the Crown for the residue of the felon's life. 1 *Inst.* 39, b, 36, b, 40, a. On the felon's death, if there has been no attainder,—that is, if sentence of *death* hath not been passed upon him,—his lands will descend to his heir (without prejudice, however, to the King's year, day, and waste); but if, in addition to the conviction of felony, judgment of death has passed upon the felon, his blood has become corrupted, and he can have no heir; in which case the lands will on his death escheat to the lord of the fee, or to the King if the tenure be immediately of him. See 3 *Prest. Abs.* 391. The above statute takes away the effect of attainder, and therefore escheats are now confined to natural death without heirs, except in cases of treason and murder. If the owner of fee-simple lands were convicted of forgery, *Escheat.* and, before the law was altered, sentence of death passed upon him, which was commuted to transportation for life, the King took his year, day, and waste, the lord of the manor enjoyed the rents and profits as *bona felonum* for the life of the felon, and on his death his heir-at-law succeeded to the estate by descent in the usual way. The legal estate, it is conceived, is in the felon during his life, which he may alien so as to disappoint his heir but not the lord; the purchase money, however, if any, would belong to the lord as part of the goods and chattels of his felon, who, being degraded below the ancient villein, is also himself part of the lord's property.

A notion prevails (sanctioned no doubt by the recital in the stat. 39 & 40 *G.* 3, *c.* 88, *infra*, Crown Lands), that if a fee-

simple tenant dies without heirs his lands revert to the King ; which is only true in cases where the lands are holden immediately of the King (as in ancient demesne), or where all badges of tenure having been neglected, it is no longer known of whom the lands are mediately holden. Escheats, it is conceived, belong to the lord in right of his seigniority. They are a fruit of tenure, and were not abolished by the statute of Charles. Military tenures only were abolished by that statute, the rents and services were reserved, and fealty is a service which is still due from the fee-simple tenant to the lord of the manor. The boundaries of manors are scrupulously preserved by the perambulation of the court-leet homage every third year ; and when a tenant within that boundary dies without an heir (as a bastard for instance), the lands naturally revert back to the lord of the manor, from whom they were originally derived. See *Booth*, 135. *May v. Street*, Cro. Eliz. 120. 3 *Cru. Dig.* 416, ed. 4. *Doe v. Redfern*, 12 *East*, 96. 1 *Rosc.* 34. 4 *Haw. P. C.* 478, 7th ed. 2 *Wath. Cop.* 366, and particularly 2 *Black. Comm.* 244, *infra*, p. 501. 1 *G.* 4, c. 1, as to the Crown lands and titles by escheat, *et ante*, p. 494. [See also 4 & 5 *W.* 4, c. 29.]

[*Lord Down v. Morris*,
8 *Jurist*, 486.]

Copyright.

Copyright, 54 *G.* 3, c. 156, *A. D.* 1814.—This act extends to authors and their assigns the sole right of printing original compositions for twenty-eight years, and for the life of the author if living at the end of that time. On this statute see *Brooke v. Clarke*, 1 *Barn. & Ald.* 396, respecting *Mr. Hargrave's* edition of *Co. Litt.*, who survived the first impression upwards of fifty years. [See also 3 & 4 *W.* 4, c. 15. 6 & 7 *W.* 4, c. 110. 1 & 2 *Vict. c.* 59, and 5 & 6 *Vict. c.* 45, which last act continues copyright of books for author's life, and seven years beyond, but if that is short of forty-two years from first publication, then till such period is complete. *Ib. c.* 100. 6 & 7 *Ib. c.* 65. 7 & 8 *Ib. c.* 12.]

Attestations.

Stat. of Attestation, 54 *G.* 3, c. 168, *July*, 1814.—By this statute it is enacted, that every deed or other instrument *already made*, with the intention to exercise any power, autho-

rity, or trust, shall be of the same validity and effect as if a *Attestations.*
 memorandum of attestation of signature had been subscribed
 by the witness or witnesses thereto, and that the attestation
 of the witness or witnesses thereto, expressing the fact of
 sealing, or of sealing and delivery, without expressing the
 fact signing, or any other form of attestation, shall not
 exclude the proof or the presumption of signature. This act
 was occasioned by the decisions in *Wright v. Wakeford*,
 4 *Taunt.* 213, and *Doe v. Peach*, 2 *M. & S.* 576, but is not
 prospective.

Stamp Duty Consolidation Act, 55 *G.* 3, *c.* 184, *A. D.* *Stamps.*
 1815. 1 & 2 *G.* 4, *c.* 55. 3 *G.* 4, *c.* 117. Transfers of
 Mortgage. 6 *G.* 4, *c.* 45, 46. 5 *G.* 4, *c.* 41, repeal of
 duties on law proceedings. Irish Stamp Act, 1 & 2 *G.* 4,
c. 112.

Copyhold surrenders to Will, 55 *G.* 3, *c.* 192, *July*, 1815. *Copyholds.*
 —All *future* devises of copyhold lands are by this act
 declared valid, although there shall not have been a sur-
 render to the use of the will, in the same manner to all
 intents as if such surrender had been made. But it is
 declared that the act shall not render valid any devise which
 would have been invalid if a surrender had been made, and
 the like stamp duties and fees are made payable on admission
 of the devisee as if a surrender to will had been actually
 made. For an exposition of this statute, see 1 *Watk. Cop.*
 202, 4th ed. [See *Doe v. Ludlam*, 7 *Bing.* 275. *Doe v.*
Bartle, 5 *B. & Ald.* 501, &c. *Doe v. Hickman*, 4 *B.*
 & *Adol.* 56.]

[The above statute is repealed by the 1 *Vict. c.* 26, and
 provisions substituted by ss. 3, 4, and 5. See *Doe v. Wilson*,
 5 *Ad. & Ellis*, 321.]

By the common law aliens, that is, persons born out of the *Aliens.*
 dominions of the Crown of England, (except the children
 and grandchildren of natural-born subjects, are incapable

Aliens.

of holding freehold estates for their own benefit, unless they are naturalized by Act of Parliament, or made denizens by the King's letters patent, 1 *Inst.* 2, b. The reason given why an alien cannot purchase lands is, because the kingdom might be thereby impoverished by transporting its revenues into a foreign country, and putting a part of it under the subjection of a foreign prince. *Sty.* 21. If the purchase be made with the *King's license*, it seems that an alien may hold. See 14 *H.* 4, c. 20. He cannot protect himself by taking a conveyance in a name of a trustee, for the mischief is the same as though he had purchased the lands himself. *Rex v. Holland*, *All.* 15. 1 *Roll. Abr.* 194. *Com. Dig. Alien*, c. 3. *Harg.* n. 2. *Co. Litt.* 2, *ib.* Aliens, therefore, generally purchase in the names of their wives or children (being natural-born subjects) by way of advancement: and they are empowered by statute 13 *G.* 3, c. 14, to lend money on mortgage of West India estates. The statute 32 *H.* 8, c. 16, s. 13, makes void all leases of houses or shops granted to an alien artificer or handicraftsman. It seems, however, if an alien artificer occupies a dwelling-house or shop under an agreement which does not amount to a *lease*, as if he be tenant from year to year, or for one year or a shorter time, an action for *use and occupation* will lie against him. *Pilkington v. Peach*, 2 *Show.* 135. By the statute 11 & 12 *W.* 3, c. 6, it is enacted, that all persons, being natural-born subjects, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or other ancestor through whom they derive their pedigree, were born out of the King's allegiance. But see the subsequent statute, 25 *G.* 2, c. 39. The following statutes impose restrictions upon naturalization, 56 *G.* 3, c. 86, (*A. D.* 1816,) continued and amended by 58 *G.* 3, c. 96, 5 *G.* 4, c. 37, and 7 *G.* 4, c. 54. This subject is treated of more fully in 1 *Tho. Co. Litt.* 91—94. As to American aliens, see the case of *Doe dem. Thomas v. Acklam*, 2 *Barn. & Cress.* 779. [See also *Com. Dig.*, tit. "*Alien*," ed. 1822. *Hammond*. And see the 7 & 8 *Vict.* c. 66, *infra*.]

[59 *G. 3, c. 12, s. 8, 9, 10. 12. 17. A.D. 1819.*—By this act churchwardens and overseers of the poor are enabled to build and enlarge work-houses, and to purchase land for that purpose, and for employing the poor of the parish; and it is thereby enacted, that all such buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease for the purposes of the act, shall be conveyed demised and assured to them and their successors; and that they shall hold the same, and all other buildings, lands, and hereditaments belonging to the parish, as a body corporate, in behalf of the parish. Upon the construction of this act, see *Woodcock v. Gibson*, 4 *Barn. & Cress.* 462. *Doe v. Heley*, 10 *Ib.* 884. *Doe v. Terry*, *Adol. & Ell.* 274. *Ex parte Annesly*, 2 *Yo. & Col.* 350. See also 5 & 6 *W. 4, c. 69, s. 3*, whereby overseers and guardians of the poor are empowered to sell work-houses, &c. See also 5 & 6 *Vict. c. 18.*]

*Churchwardens
and Overseers
a Corporation
for holding
Parish Lands.*

Crown Lands and Hereditary Revenues of the King, 1 *G. 4, c. 1, A.D. 1820.*—The greatest part of the land revenues of the Crown have been from time to time granted away by successive Kings to lords of manors and others, who now for the most part hold the prerogative rights of estrays, waifs, felons' goods, deodands, &c. as their own absolute property. These grants having greatly impoverished the patrimony of the Crown, an act was passed in the reign of Queen Anne, whereby it was declared that all future grants or leases by the Crown for any longer term than thirty-one years or three lives should be void. 1 *Ann. stat. 1, c. 7*, amended and continued by the 34 *G. 3, c. 75*. At the commencement of the reign of *G. 3*, the hereditary revenues of the Crown arising from renewal, fines, unclaimed estrays, escheats from manors held *in capite*, and such like, being very uncertain, with all other hereditary revenues, were given up by his Majesty to the aggregate funds; and in lieu thereof his Majesty received 800,000*l.* a-year for the maintenance of his civil list. 1 *G. 3, c. 1*. By subsequent acts, 34 *G. 3, c. 75*. 48 *G. 3, c. 73*. 52 *G. 3, c. 161*, these hereditary revenues

Land Revenues.

Land Revenues. were put under the management of commissioners styled "Commissioners of his Majesty's Woods, Forests, and Land Revenues." This arrangement was confirmed by stat. 1 G. 4, c. 1.

Escheats to Crown.

The above-mentioned statute of Anne (1, c. 7,) having declared the King's grants void, there was no mode of re-granting lands held immediately of the Crown to the families of persons dying without heirs but by act of Parliament. This being found inconvenient, the statute of 39 & 40 G. 3, c. 88, was passed, by which, after reciting that divers lands, tenements, and hereditaments, as well freehold as copyhold, had escheated, and might escheat to his Majesty, his heirs and successors, in right of his Crown, for want of heirs of the persons last seised, it is declared, that it shall be lawful for his Majesty, by warrant under his sign manual, to direct the trusts of any lands so escheated to be performed, and to make any grants of lands so escheated to any trustee for the execution of the trusts, and to make any grants of lands escheated not subject to trusts to any person or persons, either for the purpose of restoring the same to the family of the person whose estate the same had been, or of rewarding any person making discovery of any such escheat, as to his Majesty, his heirs or successors, should seem fit ; *et vide, ante*, p. 494.

*Ejectment—
Landlord and
Tenant.*

Stat. improving Remedy by Ejectment as between Landlord and Tenant, 1 G. 4, c. 87, A. D. 1820.—This statute enacts, that where the term or interest of any tenant, now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing, made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or

person, and the landlord shall thereupon proceed by action of ejectment for recovery of possession: it shall be lawful for *him*, at the foot of the declaration, to address a note to such person or tenant, requiring him “to appear in the Court wherein the action is commenced on the first day of the *then next Term*, there to be made defendant, and find bail pursuant to the act;” and upon the appearance or non-appearance of the tenant at the day prescribed, to move for a rule, why he should not undertake to give the plaintiff a judgment as of the Term preceding, in case a verdict should go against him at the time of trial, and why he should not enter into a recognizance by himself, and two sureties in a reasonable sum conditioned to pay the costs and damages of the action; and if the tenant shall not conform thereto, then that judgment shall be for the landlord to recover possession in such ejectment immediately. *Ejectment.*

It will be recollected that *Hilary* and *Trinity* Terms are the only two Terms in which the judges go the circuits for the trial of causes wherein issues have been previously joined: hence these Terms are called issuable Terms, and ejectments can be tried only at these stated times. The above statute, by giving remedy in the next Term, much facilitates the process of ejectment as between landlord and tenant. On the construction of this act it has been decided, that tenants from year to year are not within it. *Doe. dem. Bradford v. Roe*, 5 *Barn. & Ald.* 770. See also *Doe dem. Phillips v. Roe*, 1 *Dow. & Ry.* 433. *Anon.* 1 *Ib.* 435. *Doe dem. Anglesea v. Roe*, 2 *Dow. & Ry.* 565. The Irish acts of similar tendency are the 58 *G. 3, c. 39*, 1818. 1 *G. 4, c. 41*. [See 1 & 2 *Vict. c. 74*.]

1 & 2 *G. 4, c. 15*. 1 & 2 *G. 4, c. 114*, repealed by 6 *G. 4, c. 75*, and the latter by the 1 *W. 4, c. 60*, *infra, et vide* 2 *Watk. Cop.* 84, 85, 4th ed. *Lunatics.*

Insolvent Debtors' Act, 3 *G. 4, c. 123*, *A.D.* 1822, amended by 5 *G. 4, c. 61*, amended by 7 *G. 4, c. 57*. 11 *G. 4*, and *Insolvents.*

Insolvents.

1 *W.* 4, *c.* 38. [2 *W.* 4, *c.* 44. 5 & 6 *Vict.* *c.* 116. 7 & 8 *Vict.* *c.* 96. By the last of these statutes (sect. 4,) all the property of the insolvent is vested in the assignees for the time being by virtue of their appointment, who are to be deemed officers of the Court, in which the insolvent's petition shall be filed, but the property of the insolvent is to be possessed and received by the official assignee alone, unless otherwise directed by the commissioner.]

Bankrupts.

[Stat. of Bankruptcy, 6 *G.* 4, *c.* 16, *A.D.* 1825, amended by 1 & 2 *W.* 4, *c.* 56 (20th Oct. 1831) which established the Court of Bankruptcy, and by sections 25 and 26 of the latter act it is enacted, that the bankrupt's real and personal estate shall, without any conveyance, vest in the assignees for the time being, by virtue of their appointment; until appointment of assignees the official assignee is enabled to act as sole assignee of the bankrupt's estate and effects. See also sections 16 and 27. The statute for abolishing fines and recoveries, 3 & 4 *W.* 4, *c.* 74, *s.* 55, expressly repeals the above statute, 6 *G.* 4, *s.* 65, so far as relates to estates tail; and, to that extent, also virtually repeals the 1 & 2 *W.* 4, *c.* 56, *s.* 26; and by *s.* 56, empowers any commissioner acting in any *fiat*, after the 31st December, 1833, by deed enrolled within six months after its execution, to dispose of the lands of any bankrupt tenant in tail to any purchaser for the benefit of his creditors, and to create by such disposition as large an estate as the bankrupt himself could have done under the act. Amended by 2 & 3 *W.* 4, *c.* 114. 3 & 4 *Ib.* *c.* 47. 5 & 6 *Ib.* *c.* 29. 2 & 3 *Vict.* *c.* 11, and 5 & 6 *Ib.* *c.* 122: and see ch. Gift, *in notis.*]

Pardons.

Pardons, 6 *G.* 4, *c.* 25 (20th May, 1825.)—By this statute a pardon for any felony granted on condition of transportation, imprisonment, or other punishment, is declared to have the same effect as a pardon under the Great Seal. Hence felons whose punishments are thus commuted are rendered capable of holding lands in future: but the lands and goods which

they possess at the time of conviction remain subject to forfeiture as before. 4 *Hawk. P. C.* 856, 7th ed.

Currency, 6 *G. 4, c. 79* (27th *June*, 1825) to commence *Currency.*
July, 1826.—This act regulates the law of tender, on which subject see 2 *Pow. Mortg.* 937.

[Special Resignation Bonds, 9 *G. 4, c. 94* (28th *July*, 1828.) *Special Resig-*
 —Until the case of *Fletcher v. Lord Sondes*, decided on *nation Bonds.*
 appeal *Dom. Proc.* 3 *Bing.* 501, a very general impression prevailed, that bonds and other assurances for securing the resignation of ecclesiastical preferments in favour of specified individuals were valid, although they were void for resignation generally: that case, however, decided that for either purpose such bonds, &c. were void. In consequence of the previous misapprehension of the law, many bonds and other assurances had been entered into for the purpose of special resignation, and many presentations and inductions had been made accordingly. In order, therefore, to remedy the inconveniences that might result from the above decision, the statute of the 7 & 8 *G. 4, c. 25*, was immediately passed: and subsequently the 9 *G. 4, c. 94*, rendered valid bonds, covenants, and other assurances made for the resignation of ecclesiastical preferments in favour of any one individual named in such bond, &c., or to any one or two individuals therein named, being within the degrees of relationship (by blood or marriage) to the patron specified in the act.]

[1 *W. 4, c. 40, A. D.* 1830.—This act has made a very *Rights of Ex-*
 important alteration in the law respecting the rights of *ecutors to Undis-*
 executors to the chattels real and other personal estate of *posed Residues.*
 their testator, when not disposed of by the will. Before the passing of this act, the rule of law was, that where a testator made no disposition of the residue of his personal estate, but appointed an executor, the right to such residue legally devolved upon the executor. The Courts of equity, however, interfered, and held him a trustee on behalf of the next of

kin, wherever, the intention of the testator was expressed, or clearly inferible from the will that the testator intended to impose upon the executor a duty and not a benefit; where, however, this intention could not be collected the executor's legal right prevailed, and he took beneficially. The reader will find the numerous classes of cases falling within, and exceptions to this rule, collected in 2 *Roper's Legacies*, 24, ed. 1828. The refined distinctions which have been adopted by the Courts of equity to preclude the operation of the above rule, have involved this branch of the law of legacies in much intricacy. It is conceived that the act will tend in a great measure to remedy this inconvenience, by establishing a rule the exact converse of the old one. The act provides, that the executors of all persons dying after the 1st of *September*, 1830, shall be considered as trustees of the undisposed residue for the next of kin, unless it shall appear by the will or codicil that the testator intended they should take beneficially.]

Illusory Appointments.

[Statute respecting Illusory Appointments of Real and Personal Estate, 1 *W. 4*, c. 46, (16th *July*, 1830.)—This is noticed, *supra*, pp. 270, 271.]

For facilitating the Recovery of Debts out of Real Estate.

[Statute 1 *W. 4*, c. 47, (same date) for consolidating and amending the Laws for facilitating the Payment of Debts.—This act repeals the 3 *W. & M. c. 14*, *A. D.* 1691, and substitutes amended enactments. Prior to the passing of the latter act, if a debtor died seised of real estate, and by his will devised it away from his heir, the creditor could not follow the land in the hands of a devisee, nor could he follow it in the hands of a purchaser from the heir. The statute of *W. & M.* in part remedied the evil, by placing the devisee in the same situation as the heir; but it did not provide for the event of there being no heir, giving a remedy only against the devisee *and* the heir. The latter act also was held only to apply to bond debts and covenants for the payment of sums *certain*, and not to damages for breaches of

covenant (7 *East*, 128,) or contracts under seal. The late act 1 *W.* 4, *c.* 47, remedies both these defects; it also repeals the *Trader's Assets Act*, 47 *G.* 3, *c.* 74, substituting amended enactments, and gives a remedy in that and the preceding cases against the devisee of a devisee. By sect. 6, real estate in the hands of a *bonâ fide* purchaser is protected, if aliened before the action brought. By sect. 11, infant heirs and devisees are compellable to convey as the Court of Chancery shall direct. By sect. 12, persons having life or other partial interests devised by the debtor are enabled, after a decree for sale for payment of debts, to convey by direction of the Court the fee simple to the purchaser, should there be remainders or other executory gifts over, and the concurrence of the persons entitled thereto cannot be obtained. See also 2 & 3 *Vict. c.* 68.]

[1 *W.* 4, *c.* 60, (*July* 23, 1830,) for amending the Laws respecting the Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, &c.—This statute repeals the 7 *Anne*, *c.* 19. 4 *G.* 3, *c.* 16. 4 *G.* 2, *c.* 10. 1 & 2 *G.* 4, *c.* 114. 36 *G.* 3, *c.* 90. 52 *G.* 3, *c.* 32. 52 *G.* 3, *c.* 158. 57 *G.* 3, *c.* 39. 1 & 2 *G.* 4, *c.* 15, and the 6 *G.* 4, *c.* 74. It then provides “that where any person seised or possessed of any lands upon any trust, or by way of mortgage, shall be lunatic, it shall be lawful for the committee of the estate of such person, by the direction of the Lord Chancellor, &c., to convey such land, in the place of such trustee or mortgagee, to such person, and in such manner as the Lord Chancellor shall think proper; and every such conveyance shall be as effectual as if the trustee or mortgagee, being lunatic had been of sane mind, and had made and executed the same.”

*Trustees and
Mortgagees.*

Lunatics.

Sect. 4, provides for the transfer of stock standing in the name of a lunatic trustee.

Sect. 5, enacts, that the Lord Chancellor, before inquisition may appoint a person to convey or transfer.

Sect. 6, provides, “that where any person seised or pos-

Infants.

sessed of any land upon any trust, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the Court of Chancery, to convey the same to such person, and in such manner, as the said Court shall think proper; and every such conveyance shall be as effectual as if the infant trustee or mortgagee had been at the time of making or executing the same, of the age of twenty-one years.

[Upon the construction of this section see *Goddard in Re*, 1 *Myl. & K.* 25. *Stanley in Re*, 5 *Ib.* 320. *Deardon in Re*, 3 *Myl. & K.* 508. *Payne ex parte*, 6 *Sim.* 645. *Whitton, ex parte*, 1 *Keene*, 278.]

Sect. 8 enacts, that when a trustee of real estate shall be out of the jurisdiction of the Court, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised, be alive or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee so seised, or the heir shall neglect or refuse, for twenty-eight days after a proper deed of conveyance shall have been tendered for his execution by or by an agent of the person entitled to require the same, then the Court of Chancery may direct any person it may think proper in the place of the trustee or heir to convey the same, and to be as effectual as if the trustee or his heir had conveyed. [See 1 & 2 *Vict. c.* 69, explaining and extending the above clause.]

Sect. 9 is a similar provision respecting the assignment or surrender of leaseholds, and sect. 10, respecting stocks or funds.

Sect. 14 provides, that where the person to whom mortgage money shall be payable shall be an infant, the money may be paid into the Bank in the name and with the privity of the accountant general, &c., to the credit of the cause then depending (if any), and if not, to the credit of the infant, and the receipt of the cashier of the Bank to be a discharge.

Sect. 15 extends the provisions of the act to a trustee having also an interest.

Sect. 16 makes representatives of vendors and nominal purchasers trustees within the act, after a decree for specific performance in the one case, and for declaring the nominal purchaser a trustee in the other.

Sect. 17 empowers persons taking an estate for life or other limited interest by the will of a vendor dying before the completion of the purchase, to convey by direction of the Court, the fee simple, where the concurrence cannot be obtained of the persons to whom remainders, &c. are limited.

Sect. 18 extends the provisions of the act to other constructive and resulting trusts, when declared by a decree.

By sect. 19 husbands of female trustees are to be considered trustees within the act.

The remaining clauses chiefly relate to the proceedings in the Courts of Chancery, and to the extension of the provisions of the act to other parts of the King's dominions (except Scotland), and to other Courts of equitable jurisdiction. See also stat. 4 & 5 *W.* 4, c. 23, s. 2, & *Whitton Ex parte 1 Keene*, 278.]

[1 *W.* 4, c. 65, (23 *July*, 1830), for consolidating and amending Laws relating to Property belonging to Infants, Femes Covert, Lunatics, and Persons of Unsound Mind, &c.—Chapter 60 relates to their interests as trustees or mortgagees: this act applies to property in which they are beneficially interested; it repeals 9 *G.* 1, c. 29. 29 *G.* 2, c. 31. 11 *G.* 3, c. 20. 11 *Ann.* (1) c. 3. 43 *G.* 3, c. 75. 47 *G.* 3, c. 8, s. 2. 59 *G.* 3, c. 80. 6 *G.* 4, c. 74. 9 *G.* 4, c. 78.]

*Infants, Femes
Covert, and
Lunatics, &c.*

Sect. 3 enacts that infants, femes covert, and lunatics, in their proper persons, or being infants, by guardian, femes covert by attorney, or lunatics by committee, may be admitted to copyholds.

Sect. 4 authorizes femes covert to appoint attorneys accordingly.

Sect. 5 authorizes the Lord Chancellor to appoint an attorney for the above purposes.

Sects. 6, 7, 8, 9, 10 provide for the recovery of fines.

Sect. 11 enables persons not being femes covert and femes covert (being secretly examined) to appoint attorneys for the purpose of surrendering copyholds of which customary recoveries are intended to be suffered.

*Infants, Femas
Covert, and
Lunatics, &c.*

Sect. 12 authorizes guardians of minors and femes covert, on application to the Court of Chancery, and to the Courts of Equity in Chester, Lancaster, Durham, and to the Courts of Great Session in Wales, to surrender renewable leaseholds and take new leases.

Sect. 13 is a similar provision for committees of lunatics.

Sect. 15 declares, that the new leases shall be to the same uses and upon the same trusts as the leases surrendered.

Sects. 16 and 17 are noticed in the Chapter on Infants, note, *supra*, p. 423.

Sect. 18 enacts, that where any person who ought to renew is out of the Court's jurisdiction, the Court may order such person as it may think proper to accept a surrender of the old, and grant a new lease.

Sect. 19 authorizes committees of lunatics, by direction of the Lord Chancellor, to accept surrenders and grant new leases.

Sects. 20 and 21 provide for the payment of fines and premiums.

Sect. 23 enables committees of lunatics having life or other limited interests with powers to grant leases, to execute the powers under the direction of the Lord Chancellor.

Sect. 24 authorizes committees of lunatics, who are seised in fee, in tail, or who have absolute interests in leaseholds, to grant leases or underleases.

Sect. 27 authorizes committees, by direction of the Lord Chancellor, to sell, mortgage, let, divide, exchange, or otherwise dispose of the lunatic's land, in pursuance of any contract by the lunatic after a decree for specific performance.

Sect. 28 authorizes the sale or mortgage of lunatic's lands for the payment of his debts, or for discharge of any incumbrances on his estates, or the costs of the commission. Surplus monies to be real estates, sect. 29.

Sect. 32 authorizes the Court of Chancery, &c. to apply the dividends of stocks belonging to infants for their maintenance.

The remaining clauses are in a great measure subsidiary to the preceding.]

[1 & 2 *W.* 4, c. 38, (15th October, 1831), authorizing the building of churches and chapels in parishes where the population amounts to 2000, and the churches do not afford accommodation, or where 300 persons reside more than two miles from the church ; the right of nomination to be in the persons building and endowing according to the conditions of the act; and the churches and chapels to be perpetual curacies. Property conveyed for the site under the act not to be subject to question after five years. Explained 2 & 3 *W.* 4, c. 61.

Building of Churches and Chapels in populous districts.

1 & 2 *W.* 4, c. 56, (20th October, 1831), by which the Court of Bankruptcy was established. It is amended and explained by the 2 & 3 *W.* 4, c. 114. The sections 25, 26, and 27, relate to the vesting of the real and personal estate of the bankrupt in the assignees. *Vide supra*, pp. 124—126. See also 5 & 6 *Vict.* c. 122.

Court of Bankruptcy established.

2 & 3 *W.* 4, c. 71, (1st August, 1832), an act for shortening the time of *prescription* in certain cases, such as rights of common, way, water, use of lights, &c.

Prescription.

2 & 3 *W.* 4, c. 100, (9th August, 1832), an act for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithe.

Shortening time of claims of tithes, &c.

3 & 4 *W.* 4, c. 27, (24th July, 1833). This statute limits the remedies for the recovery of lands, or rents to the period of twenty years after the right of the claimant, or the person through whom he claims shall have first accrued (*s.* 2). 1 *Yo.* & *Col.* 453. 3 *Bing. N. S.* 544. 11 *Ad. & El.* 1008. See also 7 *W.* 4, and 1 *Vict.* c. 28. The statute then defines (*s.* 3.) when the right shall have accrued; as to estates in possession; as to future estates; and as to cases of forfeiture.

Limitation of actions and suits relating to real property.

As to estates in possession. 1st, When the claimant or person through whom he claims became dispossessed or discontinued possession, or receipt of rent, the right accrued upon such dispossession or discontinuance of possession;

2 *Bing. N. S.* 505. 3 *Beav.* 308. 2nd, When the claimant claims the estate or interest of some deceased person, who continued in possession or receipt until his decease, and who was the last person entitled to and in possession of such estate the right first accrued from such death; 3rd, When the claimant claims in respect of an estate, &c. in possession conveyed (otherwise than by will) to such claimant, &c., by a person in possession or in receipt, &c., and no person entitled under such instrument of assurance, shall have been in possession or receipt, the right first accrued at the time when such claimant, &c. became entitled to the possession, &c. by virtue of such instrument.

As to future interests. When the estate, &c. claimed shall have been an estate, &c. in reversion or remainder, or other future estate, &c., and no person shall have obtained possession, &c., the right first accrued when such estate, &c. became an estate, &c. in possession.

As to cases of forfeiture or breach of condition. When the claimant, &c. shall have become entitled in respect of any forfeiture or breach of condition, the right first accrued when the forfeiture occurred or the condition was broken.

Sect. 4. Provides that where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

Sect. 5, contains a similar provision in favour of the reversioner, notwithstanding he shall have been in possession or receipt, &c. previously to the creation of the prior estate determined.

Sect. 6, provides that the administrator of a deceased person shall be deemed to claim as if there had been no interval between the death and grant of administration.

Sects. 7, 8, and 9, prescribe when the rights of parties entitled subject to estates at will, tenancies from year to year, and leases in writing reserving rent shall accrue, 8 *Jurist*, 399. 6 *Ib.* 266.

Sec. 10, provides that mere entry shall not be deemed a possession within the meaning of the act.

Sect. 11, declares that no right of entry, distress or action shall be preserved by continual claim.

Sect. 12, enacts that the possession of one or more coparceners, joint-tenants, or tenants in common shall not be deemed the possession of the rest.

Sect. 13, declares that the possession of a younger brother, or other relation of the heir, shall not be deemed the possession of such heir.

Sect. 14, provides that a written acknowledgment of title to the person entitled, or to his agent signed by the party in possession or receipt, making such acknowledgment, shall be equivalent to the possession or receipt of the party to whom such acknowledgment shall be made; whose right shall accrue from the time of such acknowledgment, or, if more than one, from the last of such acknowledgments. 6 *Mee. & Wel.* 295.

Sect. 15, enlarges the period of limitation for five years from the passing of the act, (24th July, 1833), where the possession was not adverse at that day. See 5 *Adol. & Ellis*, 291, 532. 3 *Queen's Bench Rep.* 679. 3 *Yo. & C.* 617.

Sect. 16, provides that in cases of disabilities of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, at the time when a right first accrues, the further period of ten years shall be allowed from the removal of the disability, or from the death of the party under disability (which shall first happen).

Sect. 17, provides that no action shall be brought by any person under disability at the time his right first accrued, or by any person claiming through him, but within forty years from the time at which the right accrued; although the person under disability shall have remained under one or more disabilities during the entire period of forty years, or although the term of ten years shall not have expired from the time at which he shall have ceased to be under disability, or have died. 3 *Add. & El.* 63.

Sect. 18, declares that no further time shall be allowed for a succession of disabilities.

Sect. 19, declares that no part of Great Britain and Ireland, or the adjacent islands, being part of the King's dominions, shall be deemed beyond seas. 3 *Yo. & C.* 617.

Sect. 20 provides for the barring of concurrent rights, by enacting that when any person entitled to an estate in possession, shall have been barred by the determination of the period of limitation prescribed by the act, and, at any time during that period, shall have been entitled to any other estate or interest in reversion, remainder or otherwise, such latter estate or interest shall be barred also, unless, in the mean time, the land, &c. shall have been recovered in respect of some estate or interest limited to take effect after or in defeazance of such estate or interest in possession.

Sect. 21 provides that where a tenant in tail is barred, those in remainder whom he might have barred shall be barred also.

Sect. 22, and, by this section, adverse possession against tenant in tail, runs on against those in remainder whom he might have barred.

Sect. 23 enacts, that when a tenant in tail of any land, &c. shall have made an assurance thereof which shall not bar those in remainder, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards be in possession or receipt, &c., and the same person, or any other person (other than some person entitled to such possession, &c. in respect of an estate which shall have taken effect after or in defeazance of the estate tail) shall continue or be in possession, &c. for twenty years next after the commencement of the time at which such assurance, if it had been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such twenty years, such assurance shall be and be deemed to have been effectual as against all those in remainder.

Sect. 24 fixes the time of limitation to suits in equity with

reference to the periods of legal limitation prescribed by the act.

Sect. 25 provides, that in case of express trust, the right shall not be deemed to have accrued until a conveyance shall have been executed to a purchaser for value. 12 *Sim.* 472.

Sect. 26 enacts, that in case of concealed fraud, the right of the person to recover shall be deemed to have first accrued at the time when such fraud shall, or, with reasonable diligence, might have been first known or discovered, but not to the prejudice of any purchaser *bonâ fide* for value.

Sect. 27 saves the jurisdiction of equity on the ground of acquiescence or otherwise.

Sect. 28 fixes twenty years as the period of limitation as between the mortgagee in possession and the mortgagor : and is noticed in a former page, 232.

Sect. 29 fixes the time of limitation of actions and suits by Spiritual and Eleemosynary Corporations Sole to the following periods, from the time at which their right first accrued (namely) the period during which two persons in succession shall have held the office or benefice, in respect whereof the land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the time of such two incumbencies and six years together shall amount to sixty years ; and if such time shall not amount to sixty years, then during such further term as will make up that full period.

Sect. 30, this and the two following sections relate to advowsons. This section enacts that no advowson shall be recovered, but within three successive incumbencies adverse to the right of the claimant : if such three incumbencies shall not make up the term of sixty years, then after the expiration of such further term, as will together with the times of such three incumbencies make up the full period of sixty years.

Sect. 31, provides that incumbencies after lapse shall be reckoned within the above period, but no incumbencies after promotion to bishoprics.

Sect. 32, enacts that persons claiming right to present, &c. by virtue of an estate which the owner of an estate tail in the

advowson might have barred, shall be deemed a person claiming through the tenant in tail.

Sect. 33, provides that no advowson shall be recovered under any circumstances after an adverse possession of one hundred years.

Sect. 34, declares that at the end of the period of limitation prescribed by the act, the right of any party out of possession shall be extinguished.

Sect. 35, constitutes receipt of rent receipt of profits, for the purposes of the act.

Sect. 36, abolishes, after the 31st day of *December* 1834, all real and mixed actions (except a writ of right of dower, a writ of dower *unde nihil habet*, a *quare impedit*, or an ejectment.)

Sect. 37, preserves the right in certain cases to bring real actions until the 1st *June*, 1835.

Sect. 38, saves the rights of persons entitled to bring real actions only at the commencement of the act.

Sect. 39, declares that after the 31st *December* 1833, no descent cast, discontinuance, or warranty shall bar any right of entry or action for the recovery of land.

Sect. 40, enacts that, from the last above mentioned day, money charged upon land and legacies shall be deemed satisfied after the period of twenty years, if there be neither interest paid nor acknowledgment in writing made in the mean time. (2 *Myl. & Cr.* 309. 12 *Sim.* 26.)

Sect. 41, enacts that no arrears of dower shall be recovered for more than six years.

Sect. 42, contains a similar provision respecting arrears of rent and interest in respect of sums charged upon or payable out of land or of interest, &c., with an exception where a prior mortgagee or incumbrancer was in possession or receipt of the rents. [12 *Ad. & El.* 536. 2 *Bing. N. S.* 679. 3 *Ad. & El.* 884. 2 *Hare*, 326. 3 *Beav.* 22, 86.]

Sect. 43, extends the act to Spiritual Courts.

Sect. 44, excludes from the operation of the act Scotland, and, as to advowsons, Ireland.

[3 & 4 *W. 4, c. 42*, (19th August, 1833,) for the further amendment of the law, and the advancement of justice. Section 3, limits actions on specialties, (2 *Bing. N. S.* 674. 2 *Hare*, 326.)]

3 & 4 *W. 4, c. 74*, (28th August, 1833). Many of the provisions of this important statute have been noticed in the course of the work, *supra*, pp. 108—133. We shall here only refer to cases which have occurred upon some of the sections. (ss. 7—11, 1 *Bing. N. S.* 355. 2 *Ib.* 626. 3 *Ib.* 297. 4 *Ib.* 633.) (s. 32. 11 *Sim.* 508.) (s. 33. 3 *Myl. & K.* 245. 247. 249. 250. 3 *Myl. & Cr.* 266.) (s. 48. 3 *Myl. & K.* 245—250. 2 *Myl. & Cr.* 112.) (s. 53. 5 *Dowl.* 273.) (s. 77. 5 *Bing.* 226. 7 *Dowl.* 258.) (s. 81. 3 *Bing. N. S.* 304.) (s. 84. 1 *Bing. N. S.* 265. 1 *Scott*, 80. 3 *Dowl. P. C.* 112.) (s. 85. 2 *Bing. N. S.* 268. 5 *Ib.* 226.)

Abolition of fines and recoveries in England, and substitution of more simple modes of assurance.

————— *c. 87*, (28th August, 1833.) For remedying a defect in titles to lands, &c. allotted, sold, divided, or exchanged under acts of inclosure, in consequence of the award not having been enrolled or not having been enrolled within the time limited by the several acts; and for authorizing the appointment of new commissioners in certain cases, where the same shall have been omitted. The statute (s. 1,) renders all awards already made, but not enrolled, from the execution thereof, as valid as if enrolled within the time limited by the act.

For remedying defects of title in lands allotted under inclosure acts.

————— *c. 104*, (29th August,) renders freehold and copyhold estates in all cases assets for the payment of simple contract, or specialty debts.

Real estate made assets for simple and contract debts.

————— *c. 105*, (29th August,) for amending the law relating to dower. Its provisions are fully noticed in the chapter of Dower, *supra*, p. 85.

Dower.

————— *c. 106*, (29th August,) for amending the law

Inheritance.

of inheritance. The provisions of this act are fully noticed in the chapter on the law of inheritance, *supra*, p. 451.

*Apportionment
of rents, &c.*

4 & 5 W. 4, c. 22, (16th June, 1834,) to amend the statute 11 G. 2, c. 19, respecting the apportionment of rents, annuities, and other periodical payments. It is noticed, *supra*, pp. 284—286.

*Escheat and
forfeiture.*

———— c. 23, (27th June,) this statute amends the law relating to the escheat and forfeiture of real and personal estate held in trust. Where a trustee or mortgagee dies without heir, the Court of Chancery, by s. 2, is empowered to appoint a person to convey in the manner provided by the 11 G. 4, and 1 W. 4, c. 60. Section 3 enacts, that real or personal estate vested in a trustee or mortgagee shall not escheat, or be forfeited by reason of the attainder of such trustee or mortgagee.

*Exchange of
lands in com-
mon fields.*

———— c. 30, (25th July,) to facilitate the exchange of lands lying in common fields. See 3 & 4 Vict. c. 31.

*Abolition of
fines and re-
coveries in
Ireland.*

———— c. 92, (15th August). This act for the abolition of fines and recoveries in Ireland, and for the substitution of more simple modes of assurance, is, with the omission of some clauses inapplicable to lands in Ireland and with a very few exceptions, a copy of the statute 3 & 4 W. 4, c. 74, and is noticed in a former page, 133.

*Conveyance of
workhouses
and other
parish property.*

5 & 6 W. 4, c. 69, (9th September, 1835.) To facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes. The act (s. 2,) gives power to the overseers and guardians of the poor to sell, exchange, let, or otherwise dispose of any parish lands and property, and to apply the money in the purchase, building, or providing of a workhouse or otherwise, for the permanent advantage of the parish as the poor law commissioners may approve.

6 & 7 *W.* 4, c. 20, (21st *June*, 1836.) To impose certain restrictions on the renewal of leases by ecclesiastical persons. *Renewal of leases by ecclesiastical persons.*

———— c. 64, (13th *August*.) Explaining the last statute. *Explaining last statute.*

———— c. 71, (13th *August*.) For the commutation of tithes in *England and Wales*, amended by the 7 *W.* 4, and 1 *Vict.* c. 69, and see 1 & 2 *Vict.* c. 64. *Commutation of tithes.*

———— c. 86, (17th *August*.) For the registering of births, deaths, and marriages in *England*. *Registry of births, deaths, &c.*

7 *W.* 4, and 1 *Vict.* c. 22, (30th *June*.) To explain the preceding act of registry. See 3 & 4 *Vict.* c. 92. *Explaining last statute.*

———— c. 26, (3rd *July*.) For the amendment of the laws respecting wills: this act is discussed in the chapter on *Devise*, *supra*, 364—387, see also p. 272. *Amendment of law of wills.*

———— c. 28, (3rd *July*.) To amend the 3 & 4 *W.* 4, c. 27, enacting that mortgages shall be within the definition of “land” in the amended act, and that mortgagees, or those claiming under them may recover land in mortgage to them within twenty years after the last payment of principal or interest. *Amendment of 3 & 4 W. 4, c. 27.*

———— c. 69, (15th *July*.) To amend the above act of 6 & 7 *W.* 4, c. 71, for the commutation of tithes in *England and Wales*. *Amendment of 6 & 7 W. 4, c. 71.*

———— c. 80, (17th *July*.) Exempting certain bills of exchange and promissory notes from the operation of the usury laws. *Exemption of certain bills of exchange, &c. from usury laws.*

1 & 2 *Vict.* c. 31, (4th *July*, 1838.) To facilitate the sale of church patronage belonging to municipal corporations. *Sale of church patronage of municipal corporations.*

*Qualification
of members of
Parliament.*

1 & 2 *Vict. c. 48*, (27th July.) For amending laws relating to qualifications of members of Parliament.

*Merger of
tithes.*

————— *c. 64*, (4th August.) To facilitate the merger of tithes in land: see also 2 & 3 *Vict. c. 62*, (17th August, 1839,) 3 & 4 *Ib. c. 15*, (4th June, 1840,) 5 & 6 *Ib. c. 54*, (30th July, 1842.)

*Estates vested
in heirs, &c. of
mortgagees.*

————— *c. 69*, (4th August.) For conveyance of estates vested in heirs and devisees of mortgagees, *supra*, page 508.

*For recovering
possession after
determination
of tenancy.*

————— *c. 74*, (10th August.) To facilitate the recovery of possession of tenements after due determination of the tenancy.

*Legal proceed-
ings by joint-
stock banking
companies and
other co-part-
nerships.*

————— *c. 96*, (14th August.) To amend the law relative to legal proceedings by joint-stock banking companies and other co-partnerships against their own members; extended by 3 & 4 *Vict. c. 111*, (11th August, 1840); made perpetual 5 & 6 *Vict. c. 85*, (5th August, 1842): see also 7 & 8 *Vict. c. 110*, and *c. 111*, (5th September, 1844).

*Church Build-
ing Acts.*

————— *c. 107*, (15th August.) To amend the Church Building Acts.

*Remedies
against debtors;
Judgments a
charge on legal
and equitable
real estate, &c.
stock in the
funds, and
registering
judgments.*

————— *c. 110*, (16th August.) For extending the remedies of creditors against the property of debtors: 13th section makes judgments a charge on real estate, whether legal or equitable, or over which the debtor has a power of appointment: 14th section provides for charging stock, &c., in the public funds, &c., s. 19 for registering judgments: see also 3 & 4 *Vict. c. 82*, (7th August, 1840.)

*Protection of
purchasers
against judg-
ments, Crown
debts, &c.*

2 & 3 *Vict. c. 11*, (4th June, 1839.) To protect purchasers against judgments, crown debts, *lis pendens*, and *fiats* in bankruptcy.

- 2 & 3 *Vict. c. 18*, (1st *July*.) To enable archbishops and bishops, to raise money on mortgage of their sees for building or providing fit houses for their residence. *Archbishops, &c. empowered to raise money for providing fit residences.*
- *c. 29*, (19th *July*.) For the further protection of purchasers, without notice, against prior acts of bankruptcy. *Protection of purchasers against acts of bankruptcy.*
- *c. 37*, (29th *July*.) For amending and extending the 7 *W. 4*, and 1 *Vict. c. 80*, which exempts certain bills of exchange and promissory notes from the usury laws. By these amendments, it would seem, that agreements for the loan or forbearance of money above 10*l.*, so that they do not relate to real estate, or any interest therein, are also exempted from the operation of the usury laws; consequently any rate of interest may be taken on securities extending only to personalty. Extended by 3 & 4 *Vict. c. 83*, and 6 & 7 *Ib. c. 45*, to *June*, 1846. *Repeal of the usury laws in certain cases, bills of exchange, &c. and agreements for loans on personal property.*
- *c. 39*, (17th *August*.) To amend 1 & 2 *Vict. c. 110*, for amending laws for relief of insolvent debtors, also 5 & 6 *Vict. c. 116*, (12th *August*, 1842.) *Relief of insolvent debtors.*
- *c. 60*, (17th *August*.) To explain and extend 11 *G. 4*, and 1 *W. 4, c. 47*, for consolidating and amending laws for facilitating the payment of debts out of real estate. *For payment of debts out of real estate.*
- *c. 62*, (17th *August*.) To explain and amend acts for the commutation of tithes. *To explain Commutation of Tithe Acts.*
- 3 & 4 *Vict. c. 31*, (23rd *July*, 1840.) To extend the powers of the acts relating to the inclosure of open and arable fields in *England* and *Wales*. *Inclosure of open fields.*
- *c. 55*, (4th *August*.) To empower owners of settled estates to defray expenses of draining by mortgage. *Expense of drainage defrayed by mortgage.*
- *c. 92*, (10th *August*.) To enable Courts of *Evidence of births, deaths, burials, &c.*

Justice to admit non-parochial registers as evidence of births or baptisms, deaths or burials, and marriages.

Lease for a year dispensed with. 4 & 5 *Vict. c. 21*, (18th May, 1841.) To render a release of real estate as effectual for conveyance, as a lease and release.

Commutation of manorial rights and the facilitating of enfranchisement. ————— *c. 35*, (21st June.) For commutation of manorial rights of copyhold customary and other lands, and for facilitating enfranchisement of such lands: amended 6 & 7 *Vict. c. 23*, and 7 & 8 *Vict. c. 55*, (29th July, 1844.)

Conveyance and endowment of sites for schools. ————— *c. 38*, (21st June.) To afford further facilities for conveyance and endowment of sites for schools: and see 7 & 8 *Vict. c. 37*, ss. 3, 4.

Sale of parish property. 5 & 6 *Vict. c. 18*, (13th May, 1842.) To explain and amend acts relating to sale of parish property; explaining 5 & 6 *W. 4, c. 69*, s. 3.

Farming leases by ecclesiastical persons. ————— *c. 27*, (18th June.) To enable incumbents of ecclesiastical benefices to grant farming leases.

Income Tax. ————— *c. 35*, imposing a tax upon income.

For perpetuating testimony. ————— *c. 69*, (30th July, 1842.) To perpetuate testimony in certain cases.

Amendment of bankruptcy law. ————— *c. 122*, (12th August.) For the amendment of the law of bankruptcy.

The better providing for spiritual care of populous parishes. 6 & 7 *Vict. c. 37*, (28th July, 1843.) To make better provision for the spiritual care of populous parishes: by s. 20 patronage may be conferred upon contributors.

Statute of Limitations to Ireland. ————— *c. 54*, (10th August.) Extending the Statute of Limitations 3 & 4 *W. 4, c. 27*, to *Ireland*, explained by 7 & 8 *Vict. c. 27*.

7 & 8 Vict. c. 66, (6th August, 1844.) To amend the *Aliens*.
laws relating to aliens.

———— c. 70, (6th August.) To facilitate arrange- *Arrangements*
ments between debtors and creditors on petition to Court of *between debtors*
Bankruptcy. *and creditors.*

———— c. 76, (6th August.) To simplify the transfer *Transfer of*
of property: this statute is referred to throughout the work, *property.*
see ch. Remainder, Uses and Trusts, Release, Bargain and
Sale, &c., it came into operation 1st January, 1845. *&c.*

———— c. 110, (5th September.) For registration, incor- *Registration,*
poration, and regulation of Joint Stock Companies. *incorporation,*
and regulation
of joint stock
companies.

———— c. 111, (5th September.) For winding up *Winding up of*
affairs of Joint Stock Companies. *their affairs.*

8 & 9 Vict. c. 106 (4th August 1845) An Act to
amend the law of real property referred to
in notes.

———— c. 112 (5 August) An Act to render
the assignment of satisfied terms unnecessary.

———— c. 119. An Act to regulate
the exercise of the power of

———— An Act to regulate
the granting of certain leases

———— c. 97. (4 Aug) An Act to amend
the law respecting testamentary dispositions of
property in the public funds &c. and to provide for
payment of dividends in cases of attorney
in certain cases

———— c. 56. Drainage &c

ADDENDA.

THE reader is referred to the note in the chapter "*Gift*," p. 309, in which the case of *Attorney General v. Jones*, 3 *Price*, 368, is noticed, and *Gaskell v. Gaskell*, 2 *Yo. & J.* 502, is cited, and to which may be added the recent case of *Sheldon v. Sheldon* (*July*, 17, 1844), 8 *Jurist*, 877. It did not occur to the Editor, as that part of the work was passing through the press, that it might be useful to remind the student, that those cases do not affect voluntary settlements of stock, leasehold and other personal estate, upon the execution of which the property is actually transferred to the trustees, and the deed delivered up to them, although the settlor may reserve to himself a power of revocation. It must be conceded that such deeds are made with a view to avoid probate and legacy duty, but they have long been in use, and no doubt has been entertained of their validity. *Thompson v. Browne*, 3 *Mylne & K.* 32.

It would, however, be dangerous to include in such settlements, any property of which the settlor retains the actual legal possession and control, as the whole instrument might, in that case, be held testamentary. The settlor should also carefully abstain from any reference in his *will* to the settlement.

It is not advisable to omit the power of revocation ; indeed, few settlors would choose irrevocably to part with their property in their lifetime ; but it is suggested for consideration, whether it might not be the safer course to reserve the power of revocation by *deed* only, and not by *will* ; because a

general residuary disposition of personal estate under the 27th section of the 2 *Vict. c. 26*, might be construed as an exercise of the power of revocation and new appointment, and so, unintentionally, defeat the settlement, by passing the property comprised therein to the residuary legatee.

In the decision of *Sheldon v. Sheldon* by Dr. *Lushington*, (sitting for Sir *H. Jenner Fust*), as reported in the 8 *Jurist*, the following observation is ascribed to that learned Judge, "I may here observe that since the decision of *Thompson v. Browne*, the law, as to legacy duty, has been altered, in order and so as to make duty payable on instruments intended to avoid legacy duty." As this supposed *dictum* created some anxiety and alarm in the Profession, the Editor felt it his duty to ascertain, if possible, whether it was accurately reported. He has been obligingly favoured with the perusal of the MS. judgment, as delivered by the learned Judge, in which no such passage, as that imputed to him, occurs. Possibly in the course of his observations, he may have adverted to the alteration as once in contemplation, but which never passed into law, and so may have been misunderstood by the reporter; but the Editor feels himself authorized to state, that no such *dictum*, as that imputed, formed any part of the able judgment in *Sheldon v. Sheldon*.

In that judgment, the reader will find the alterations in the law, effected by the late Statute of Wills, respecting the probate of testamentary papers, and the incorporation into the will of separate instruments, whether valid *per se* or otherwise, clearly and pointedly stated by Dr. *Lushington*.

In corroboration of the Editor's observations in the Chapter "*Fême Covert*," pages 437—440, the reader is referred to the recent case of *Harrop v. Howard*, 9 *Jurist*, 82, decided by Sir *James Wigram*, V. C.

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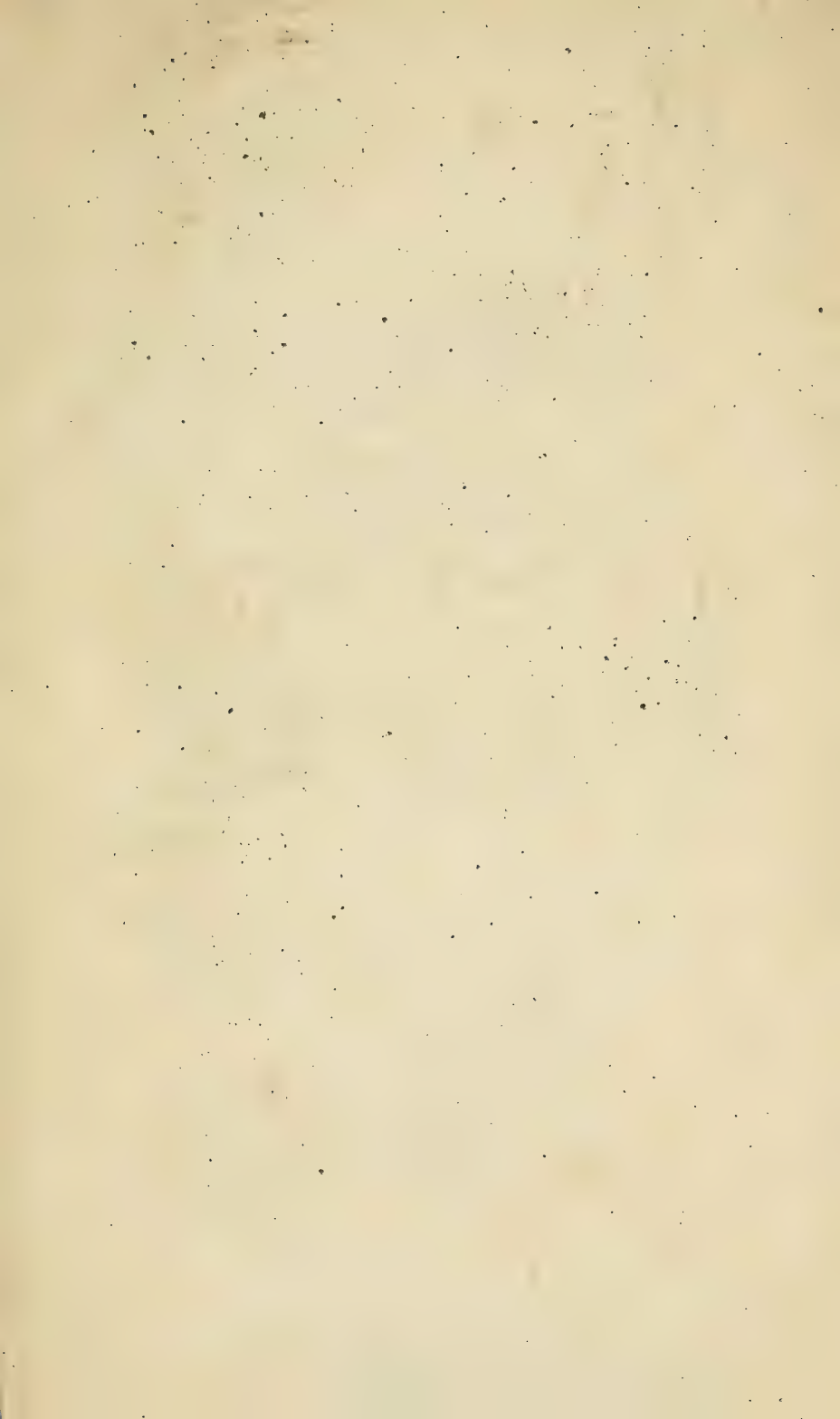
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THE END.

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